However, we note from the affidavits of the State Legal Adviser, Kelantan filed in support of his application in all the three actions which are now the subject of appeal that 154 out of the 157 plaintiffs/appellants had filed actions earlier in Kota Bahru Civil Suit Nos. 86/1978 and 94/1978 against the third respondent, the Government of the State of Kelantan.

That respondent had *inter alia* pleaded in defence that the plaintiffs had not been appointed Penghulus within the definition of the Interpretation Act, 1967 or as members of any of the public services or holders of any office of profit within the meaning of the Federal Constitution and since their appointments as Penghulus Kampong were honorary and at the pleasure of the third respondent they had no right, lien or title to such appointments.

On February 28, 1979 the appellants filed a notice discontinuing wholly their actions against the respondent.

We are inclined to agree with the learned Legal Adviser that in filing C.S. No. 137/81, C.C. No. 2/82 and C.S. No. 4/82 well out of time the plaintiffs/appellants had been guilty of unreasonable delay.

We note that these subsequent suits were filed approximately 43 months, 46 months and 45 months respectively after the letter terminating the appellants' services were sent to them, and therefore well after the three year limit prescribed by s.2(a) of the Public Authorities Protection Act, 1948.

No explanation was given by learned counsel for the appellants for this strange course of events in his affidavits in reply or at the hearing of the appeals.

Now the granting of a declaratory judgment is a matter purely at the discretion of the court. We do not think that the circumstances surrounding the present appeals would justify our exercising this discretion in favour of the appellants where there has been, in our view, unreasonable vaccillation and delay. We set down hereunder a passage from page 191 of The Declaratory Judgment by Zamir:–

"This discretion is employed, as discretion was originally employed in respect of all equitable remedies, primarily to do justice in the particular case before the court. It is wide enough to allow the court to take into account virtually all objections and defences possible in equitable proceedings. Thus, for instance, in one declaratory action the court took into consideration the motives of the plaintiff in bringing the action *(Everett* v. *Griffiths* [1924] 1 K.B. 941, 960-61. In another action *(Hogg* v. *Scott* [1947] 1 K.B. 759, 767) the court held that the plaintiff had waived his right to take the proceedings and, further assumed that the claim might also be dismissed on the ground of undue delay ("laches") (Limitation Act 1939).

Accordingly we dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *Wan Mustapha & Co.*

DATO MOKHTAR BIN HASHIM & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah L.P., Abdul Hamid & Abdoolcader F.JJ.) June 9, 10, 13 to 17, 20 to 23 & July 23, 1983]

[Kuala Lumpur – Federal Court Criminal Appeal Nos. 10 & 11 of 1983]

Criminal Law & Procedure – Murder – Trial – Security case – Whether Attorney General's certificate could be challenged – Statement by accused to be admissible must be voluntary – Admissibility of lock-up register and station diaries – Statement recorded after prolonged period of interrogation at extremely odd hours ranging into the early hours of the morning in breach of Lock-up Rules – Statement not voluntary and should not have been admitted – Circumstantial evidence – Question of fact based on credibility of witness – Functions of Appellate Court limited in character and scope – No reason to interfere with assessment of trial judge – Impeachment of credit of witness – Effect of – Refusal to allow cross-examination an error – No substantial miscarriage of justice – Expert witness – Acceptance by trial judge – Ownership, possession, custody and control of pistol from which shots fired – Prima facie case against first appellant – Defence of alibi – Assessment by trial judge – Question of fact – Remarks on vituperative language used in petition of appeal and contumelious suggestions in address by counsel – Lock-up Rules, r. 20 – Essential (Security Cases) Regulations, 1975 Reg. 2(2) & 21 – Evidence Act, 1950, ss. 35, 145 & 155(c) – Criminal Procedure Code (F.M.S. Cap. 6), s. 112.

Evidence – Statement by accused person – Admissibility – Impeachment of credit of witness – Evidence Act, 1950, ss. 35, 145 & 155(c).

This was an appeal against the conviction of the appellants on a charge of murder. It was alleged at the trial that the two appellants together with two other persons, in furtherance of their common intention did commit murder by causing the death of one Dato Mohamad Taha

bin Talib and thereby committed an offence punishable under section 302 read with section 34 of the Penal Code. The case was classified as a security case by virtue of a certificate issued by the Attorney-General under the provisions of regulation 2(2) of the Essential (Security Cases) Regulations, 1975. The case was heard in the High Court in Kuala Lumpur. At the end of the case of the prosecution the learned trial judge acquitted the other two accused on the ground that no *prima facie* case had been shown against them, but called on the appellants for their defence. At the conclusion of the case for the defence the learned trial judge convicted the appellants. The appellants appealed against their conviction and sentence.

Held: (1) the point that this was not a security case but one of law and order and that in the circumstances the Attorney-General could not and should not have issued his certificate under the Essential (Security Cases) Regulations, 1975, had been decided by the Federal Court in *Mohd. Noordin bin Johan* v. *Attorney-General Malaysia*[1] which arose out of and in connection with the same proceedings by an application by one of the first appellants' co-accused. Moreover, the first appellant had applied by *certiorari* to question the Attorney-General's certificate in this matter but leave was refused. The attempt to re-litigate and re-open an issue conclusively decided in respect of the same proceedings and between the same parties would appear to be a clear instance of an abuse of the process of the court;

(2) under Regulation 21 of the Essential (Security Cases) Regulations the prosecution must prove that a statement made by the accused was voluntary if they had wanted to rely on it;

(3) the lock-up register was clearly admissible under section 35 of the Evidence Act as it was a journal within rule 34(2) of the Lock-up Rules 1953 and the lock-up register produced in this case had cross-references to entries in the station diaries; this correlation would therefore make all the relevant entries in the station diaries admissible as they formed part of the lock-up register and the two must therefore be read co-jointly. The entries were confirmed by the evidence of a prosecution witness and accordingly formed part of the evidence before the learned judge in the *voir dire;*

(4) it was open to an Appellate Court to interfere with the finding on a question of fact as to the voluntariness of a confession if the impugned finding had been reached without applying the true and relevant legal tests and consideration of relevant matters. In this case the learned trial judge wholly discounted the entries in the station diaries and appeared to have adopted an approach that was incorrect in that he seemed to virtually reverse the burden of proof on the second appellant to rebut the evidence for the prosecution instead of dealing with the matter as one for the prosecution to establish beyond reasonable doubt that the statement made by the second appellant was voluntary. The entries in the station diaries which were confirmed by the evidence of a prosecution witness showed prolonged periods of the interrogation ranging into the early hours of the morning in breach of Rule 20 of the Lock-up Rules. In the circumstances it would be wholly unsafe to treat the statement as voluntary and it should not have been admitted in evidence;

(5) the entire case against the second appellant rested on this statement and nothing else and apart from that there was no other evidence against him. His defence should not therefore have been called as there was no case against him. His appeal should therefore be allowed and his conviction set aside;

(6) where circumstantial evidence is the basis of the prosecution case the evidence must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury, the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt;

(7) the credibility of a witness is primarily a matter for the trial judge. The functions of an Appellate Court, when dealing with a question of fact in which questions of credibility are involved are limited in their character and scope and in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an Appellate Court must in order to reverse not merely entertain doubts whether the decision below is right but be convinced that it is wrong. In this case the learned trial judge accepted the evidence of Atun, the prosecution witness, whom he found to be a consistent witness unshaken by very severe cross-examination and the Appeal Court could find no reason to interfere with his assessment;

(8) the learned trial judge in this case was right in rejecting the application to impeach Atun as there was no basis therefore. There must be some material contradiction or other circumstances unexplained by the witness in the first instance before counsel can move to seek to impeach his credit. A mere hunch will not suffice;

(9) the order made by the learned trial judge in impeaching the credit of the witness Abdullah bin Ambek and denying the right to counsel for all the accused to cross-examine him was clearly wrong. When a witness's credit is sought to be impugned under the provisions of sections 145 and 195(c) of the Evidence Act his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say at the close of the case for the prosecution or for the defence as the case may be. No immediate order of a summary nature can or should be made as was done in this case and the right of cross-examination or re-examination according to the circumstances should not be denied as it might well be that in the exercise of such right his credit might be repaired, restored or re-established. This was all the more pertinent in this case as Abdullah bin Ambek had himself raised the issue of the voluntariness of the statement he made to the police. In view however, of the overall strength of the other evidence against the first appellant no substantial miscarriage of justice had been occasioned on this count and the Appellate Court applied the proviso to section 60(1) of the Courts of Judicature Act, 1964;

(10) there was in the circumstances in this case no gap regarding the handing over by and taking possession of the pistol and the evidence clearly showed that this was the pistol owned by the first appellant. The prosecution in this case has established that the first appellant was in possession, custody and control of the pistol at the material time stated in the charge and the learned judge who saw and heard the expert witness, Gee, accepted him as an expert after a considered assessment of his evidence and there was no reason or justification whatsoever to dissent from his conclusion;

(11) in this case the chain of evidence with regard to the recovery of the bullets right up to their subsequent

production in court during the trial was complete and there can therefore be no doubt that the exhibits produced in court were the same ones examined by Gee;

(12) where a firearms expert had made the necessary tests and there was no reason for distrusting his opinion which in fact the court had accepted, there could be no room for thinking in the circumstances established that anyone else other than the accused might have shot the deceased. In the premises and in the light of the evidence adduced by the prosecution that the pistol from which the fatal shots were fired belonged to and was in the possession, custody and control of the first appellant at the material time, the facts proved at the close of the prosecution case point to one and only one conclusion, that it was the first appellant who fired the fatal shots that killed the deceased. The learned judge therefore correctly concluded that the prosecution had established a case against him requiring him to enter on his defence;

(13) the burden of proving an *alibi* lies on the accused setting up the defence but even so the burden of proof as to the guilt of the accused always remains on the prosecution irrespective of whether or not the accused had made a plausible defence;

(14) the learned judge in this case considered the evidence adduced in some detail and on his assessment and for the reasons he gave held that the defence was unsubstantiated. This was essentially a question of fact which turned primarily on the credibility of witnesses and was primarily a matter for the trial judge;

(15) the learned trial judge who saw and heard the witness, Fassnacht, called for the defence, did not accept him as an expert and the Appellate Court saw no reason to interfere with the doubt he had expressed as to the witness's standing as an expert for the reason he had given;

(16) in all the circumstances, the learned judge found that the evidence adduced by and for the first appellant in his defence had not succeeded in creating any doubt on the truth of the case for the prosecution and the Appellate Court concurred with his finding;

(17) there was no justification in this case for the vituperative nature of the language in which the petition of appeal by the first appellant had been couched and the contumelious suggestions that had been put forward in the address of counsel to the court which had dragged the learned judge into the arena of conflict and subjected him to a personal attack with a virtual suggestion of complicity on his part. The line taken was ill-chosen, mischievous and contemptuous in the circumstances;

(18) the appellants had not been denied a fair trial and the remarks that were subject to attack though perhaps injudicious, were bereft of any sinister connotation against the background in which they were made, and could not and did not affect the proceedings or cause in any way any miscarriage of justice.

Cases referred to:

(1) *Johnson Tan Han Seng* v. *Public Prosecutor* [1977] 2 M.L.J. 66, 72.
(2) *Public Prosecutor* v. *Sihabduin & Anor.* [1980] 2 M.L.J. 273.
(3) *Muniandy & Ors.* v. *Public Prosecutor* [1966] 1 M.L.J. 258.
(4) *Yaacob* v. *Public Prosecutor* [1966] 1 M.L.J. 67.
(5) *Public Prosecutor* v. *Law Say Seck & Ors.* [1971] 1 M.L.J. 199.
(6) *Hem Raj* v. *State of Ajmer* A.I.R. 1954 S.C. 462, 464.
(7) *Pyare Lal* v. *State of Rajasthan* A.I.R. 1963 S.C. 1094, 1096.
(8) *Irfan Ali* v. *State* (1970) Cr. L.J. 603.
(9) *Director of Public Prosecutor* v. *Ping Lin* [1975] 3 All E.R. 175; [1976] A.C. 574.
(10) *R.* v. *Silverlock* [1894] 2 Q.B. 766, 771.
(11) *Public Prosecutor* v. *Muhamed bin Sulaiman* [1982] 2 M.L.J. 320.
(12) *Husdi* v. *Public Prosecutor* [1980] 2 M.L.J. 80, 81.
(13) *Raymond Turnbull & Ors.* (1976) 63 Cr. App. R. 132.
(14) *R.* v. *Robson* and *R.* v. *Harris* [1972] 1 W.L.R. 651.
(15) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57.
(16) *R.* v. *Morgan* [1981] 2 N.Z.L.R. 164.
(17) *Herchun Singh & Ors.* v. *Public Prosecutor* [1969] 2 M.L.J. 209.
(18) *Osman & Anor.* v. *Public Prosecutor* [1967] 1 M.L.J. 137 F.C., [1968] 2 M.L.J. 137, P.C.
(19) *Yap Sow Keong & Anor.* v. *Public Prosecutor* [1947] M.L.J. 90.
(20) *R.* v. *Watson* [1980] 2 All E.R. 293.
(21) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105.
(22) *Mahbub Shah* v. *King Emperor* (1945) 72 I.A. 148, 153.
(23) *Gunadhar Das* v. *State* A.I.R. 1952 Cal. 618.
(24) *Herchun Singh & Ors.* v. *Public Prosecutor* [1969] 2 M.L.J. 209, 211.
(25) *Yap Chai Chai & Ors.* v. *Public Prosecutor* [1973] 1 M.L.J. 219.
(26) *Bhuboni Sahu* v. *R.* A.I.R. 1949 P.C. 257; 76 I.A. 147.
(27) *Yusoff & Anor.* v. *Public Prosecutor* [1956] M.L.J. 47, 48.
(28) *Ong Kim Piaw* v. *Public Prosecutor* [1949] M.L.J. 137.
(29) *Su Ah Ping* v. *Public Prosecutor* [1980] 1 M.L.J. 75.
(30) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(31) *Mohamed Nordin bin Johan* v. *Attorney-General Malaysia* [1983] 1 M.L.J. 68.
(32) *Hunter* v. *Chief Constable of the West Midlands Police & Ors.* [1982] A.C. 529, 542.
(33) *Tractors Malaysia* v. *Charles Au Yong* [1982] 1 M.L.J. 320, 321.
(34) *Dirgaj Deo Bahadur* v. *Beni Mahto & Ors.* A.I.R. 1917 P.C. 197.
(35) *Ibrahim* v. *R.* [1914] A.C. 599, 609.
(36) *Wong Kam-Ming* v. *R.* [1980] A.C. 247, P.C.
(37) *R.* v. *Wilson* [1981] 1 N.Z.L.R. 316.
(38) *Sarwan Singh* v. *State of Punjab* A.I.R. 1957 S.C. 637, 643.
(39) *Public Prosecutor* v. *Thum Soo Chye* [1954] M.L.J. 96, 99.
(40) *R.* v. *Priestley* (1965) 51 Cr. App. R. 1.
(41) *R.* v. *Prager* [1972] 1 W.L.R. 260.
(42) *Zahiruddin* v. *Emperor* A.I.R. 1947 A.C. 75, 77.
(43) *R.* v. *Thompson* [1893] 2 Q.B. 12, 18.

(44) *R.* v. *Pattinson and Laws* (1973) 58 Cr. App. R. 417, 424.
(45) *Jayaraman & Ors.* v. *Public Prosecutor* [1982] 2 M.L.J. 306, 310.
(46) *Watt or Thomas* v. *Watt* [1947] A.C. 484, 487.
(47) *Caldeira* v. *Gray* [1936] M.L.J. 137, 138.
(48) *Paramasivam* v. *Public Prosecutor* [1970] 2 M.L.J. 106, 107.
(49) *Sat Paul* v. *Delhi Administration* A.I.R. 1976 S.C. 294, 308.
(50) *John* v. *Rees* [1970] 1 Ch. 345, 402.
(51) *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.* [1977] 1 M.L.J. 180.
(52) *Myers* v. *Director of Public Prosecutions* [1965] A.C. 1001.
(53) *Pamplin* v. *Gorman* (1980) Cr. L.R. 52.
(54) *Baru Ram* v. *Prasanni* A.I.R. 1959 S.C. 93.
(55) *Krishnabiharilal* v. *State* A.I.R. 1956 M.B. 86, 90-91.
(56) *Joyce* v. *Yeomans* [1981] 1 W.L.R. 549.
(57) *R.* v. *Murphy* [1980] Q.B. 434.
(58) *Kalua* v. *State of Uttar Pradesh* A.I.R. 1958 S.C. 180, 183.
(59) *Anderson* v. *R.* [1972] A.C. 100, 108.
(60) *R.* v. *Mckewen* (No. 2) [1974] 1 N.Z.L.R. 626.
(61) *Gurcharan Singh & Anor.* v. *State of Punjab* A.I.R. 1956 S.C. 460, 462.
(62) *Public Prosecutor* v. *Chidambaram* A.I.R. 1928 Mad. 791, 793.
(63) *Cooper* v. *Bockett* (1846) 13 E.R. 365, 373.
(64) *R.* v. *Sodo* [1975] 61 Cr. App. R. 131.
(65) *Re Kumaraendran, An Advocate & Solicitor* [1975] 2 M.L.J. 45, 48.

HIGH COURT.

Tan Sri Abu Talib bin Othman, Public Prosecutor (*T.S. Sambanthamurthi*, Deputy Public Prosecutor with him) for the prosecution.

Jagjit Singh (*Abdul Mutalib* and *Abu Zahar Ujang* with him) for the first accused.

Manjeet Singh Dhillon (*Lawrence Perera* with him) for the second accused.

Hashim Yeop A. Sani J.: The charge reads as follows:

> That you on April 14, 1982 at or about 1.30 a.m. at Kampong Sri Asahan, Gemencheh, in the District of Tampin, in the State of Negeri Sembilan, in furtherance of the common intention of you all, did commit murder by causing the death of one Dato Mohd. Taha bin Talib, and that you have thereby committed an offence punishable under section 302 of the Penal Code read with secion 34 of the said Code.

The prosecution had earlier in the proceeding sought to admit the cautioned statement of Rahmat Satiman. Based on *Johnson Tan Han Seng* v. *Public Prosecutor*[1] the defence challenged the voluntariness of the statement. The question of voluntariness of the statement (P101) was dealt with in my written ruling dated November 8, 1982 – Appendix A. The ruling was that P101 was voluntary and admissible but did not deal with the question of its truth. Because at the close of the prosecution case the defence submissions raised important issues of facts and law. I felt that basing on *Public Prosecutor* v. *Sihabduin & Anor.*[2] a full review of the prosecution's evidence adduced was necessary and this review is contained in a written decision dated December 31, 1982 – Appendix B.

The central issues I dealt with in the written decision included the law of section 34 of the Penal Code and section 30 of the Evidence Act. Based on what I considered the proper principle to adopt following a long line of authorities I acquitted Nordin Johan and Aziz Abdullah without calling for their defence. In simple language the principle is this. A man can be convicted on his own confession. But a man cannot be convicted on the confession of another unless there is sufficient evidence, independent of the confession, to warrant his conviction. Defence was however called in respect of Dato Mokhtar and Rahmat Satiman.

Regulation 17 of the Essential (Security Cases) Regulation, 1975 as amended by P.U.(A)362/75 reads as follows:

> "The court shall decide on the guilt or innocence of the accused only at the conclusion of the case for the defence, and it shall so decide upon hearing and considering the evidence of both the prosecution and the defence as a whole, having regard to the justice of the case, without regard for the technicalities of the rules of evidence or procedure, or for any defect concerning the charge."

There are therefore three principal duties imposed on the trial judge before making his decision at the conclusion of the trial. They are –

(1) He shall decide upon hearing and considering the evidence of both the prosecution and the defence as a whole;

(2) He shall have regard to the justice of the case; and

(3) He shall in arriving at his decision disregard technicalities of the rules of evidence or procedure.

The sting of this regulation is of course carried in the third limb of the regulation and it is in fact the object of attack by the purists amongst the lawyers. But fortunately the problem does not arise in this case because both the prosecution and the defence adhered as far as possible to the normal rules of evidence.

In my opinion the first and the second limb of Regulation 17 carry the normal functions of a court, that is to say to have regard to the *totality* of the evidence and the *justice* of the case. These provisions do not, however, in any way lessen the burden of the prosecution to prove their case beyond reasonable doubt and that this burden never shifts. Therefore the test to apply at the end of the defence is still the normal test, that is whether the defence has cast a doubt on the truth of the prosecution story. To warrant an acquittal however the doubt created must not merely be a fleeting doubt or a capricious doubt but a doubt in respect of which a substantial reason can be given. The question to ask now is – has the defence evidence created a reasonable doubt on the truth of the prosecution story?

As the defence of Rahmat Satiman is less complicated I propose to deal with his defence first. In substance the defence of Rahmat Satiman consists of the following parts:

(1) the request for review of the question of voluntariness of his cautioned statement (P101);

(2) the legal consequences of the impeachment of Rahmat Satiman;

(3) the *alibi;* and

(4) the testimony of Mr. Fassnacht.

The grounds relied on for the request to review the ruling on the voluntariness of P101 would seem to be the following evidence:

(a) the evidence of Zainal Abidin (DW 40) who was detained in the Gombak Police Station from May 23, 1982 to May 31, 1982. According to this witness he knew what happened to Rahmat Satiman from the time the latter was brought to the same police station on May 29, 1982 up to the time when DW 40 left the police station on May 31, 1982.

(b) The police statement made by Md. Ajib (DW 29) which statement (P107A) was used to impeach the credit of DW 29. The said statement was made on June 20, 1982 which date was of course prior to June 23, 1982 being the date of the cautioned statement (P101). According to the defence this shows that SAC Yahya (PW 2) and Insp. Badaruddin (PW 1) in the trial-within-a-trial were not telling the truth about the *alibi* given by Rahmat Satiman; and

(c) the evidence of Rahmat Satiman himself (DW 2) as a witness in the defence in the main trial.

As regards to ground (a) I find that the evidence of DW 40 is far from satisfactory not because he is a convicted criminal but because of the quality of his evidence. The confinement of Rahmat Satiman to a cell by himself (and not with DW 40 and others in the other cell) was as I said in my written ruling (Appendix A) a clear indication that Rahmat Satiman was treated as a detainee under the ISA and not as a common criminal. DW 40's evidence as to the state of dress or undress of Rahmat Satiman is also not conclusive because Rahmat Satiman was not in DW 40's view at all times of the detention. DW 40's evidence as to the serving of food by two small boys and the condition of food is contrary to the evidence of Rahmat Satiman himself in the trial-within-a-trial. Lastly DW 40's evidence as to what happened in the Bilik Gerakan when DW 40 was with Insp. Aziz in Insp. Aziz's room is improbable because it is highly unlikely that Insp. Aziz would have informed DW 40 who was actually in the Bilik Gerakan then and it is also unlikely that the door of the inspector's room was ajar ("because he was feeling hot") if the air-condition of the room was on at that time.

As regards ground (b) there is ample evidence of simultaneous interrogations of several detainees in relation to this case carried out by the police and it is therefore not a fair assumption to make that the statement taken from Md. Ajib was necessarily the result of information received from Rahmat Satiman and no other. Even if it was, it is in my opinion hardly relevant to the question of the voluntariness of P101.

As regards ground (c) namely the evidence of Rahmat Satiman himself it is to be noted that there are many new and serious allegations made by him in the witness box in the main trial. Among the new allegations are:

(1) He was beaten up so badly by the police that he urinated blood and was at times unable to walk without support;

(2) there were times when cold water was poured over him at night;

(3) when he was giving his statement to Bashir, Insp. Badaruddin punched him from behind;

(4) two boys, aged 16-18 years, sent food to him and not police officers as he said in the trial-within-a trial.

All these new and serious allegations should, if true, have come out during the intensive and severe cross-examination he underwent in the trial-within-a-trial. I am therefore more inclined to the view that all these new allegations are merely afterthoughts. Therefore I do not consider that any of the grounds constitutes sufficient basis to review the question of voluntariness of P101.

The second point raised onn behalf of Rahmat Satiman was also raised on behalf of Dato Mokhtar. This is the effect of the impeachment of the credit of Rahmat Satiman. In the course of his cross-examination in the main trial Rahmat Satiman was confronted by the Attorney-General with the various contradictions between his evidence in court and the cautioned statement he had made (P101). The Attorney-General then applied to proceed for impeachment but I deferred the ruling on impeachment and requested the Attorney-General to proceed instead with his cross-examination to enable me to assess Rahmat Satiman on the whole of his evidence. Since the proceeding for impeachment was not yet allowed or completed the question as to the consequences of impeachment is, to my mind, merely academic. It would seem to be the proposition advanced by both counsel that since the credibility of Rahmat Satiman becomes doubtful because of his previous inconsistent statements (P101 and D102) his testimony in court should be accepted as the truth. In my opinion this proposition is over-simplistic and there is no such inflexible rule of law or practice. The trial court has inherent powers to assess and evaluate the testimony of a witness and the question of credibility of a witness is a subject within the domain of the trial judge.

Thirdly it is the contention on behalf of Rahmat Satiman that he has established his *alibi* satisfactorily. The question whether an *alibi* is satisfactorily established or not depends in the final analysis on the credibility of the witnesses involved. It is not incorrect to say that an *alibi* is as good as its witness.

To establish his *alibi* Rahmat Satiman brought 14 witnesses (DW 29–DW 42) covering the period April 13 to April 14 and places like Muar, Pontian and Johor Bahru.

The core of his *alibi* evidence however is the evidence pertaining to his sojourn in Johor Bahru on the night of April 13, 1982. It is his evidence that he spent the night in the house of his friend, Md. Ajib (DW 29). Both DW 29 and his wife, Maspupah (DW 39) were however impeached based on material contradictions in their evidence and the police statements. In my opinion even if they were not impeached, all evidence pertaining to Rahmat Satiman's night sojourn in the house of DW 29 should be rejected as being highly improbable on the following grounds:

(a) According to Rahmat Satiman the purpose of his wanting to sleep in Md. Ajib's house was to have a discussion with Ajib on the arrangement of food on the marriage of his daughter, Manisah (DW 42) on April 17, 1982. I find this difficult to accept as reasonable or probable reason to put up for the night in Md. Ajib's house because in his own evidence Rahmat Satiman said he only wanted to find out how many gantangs of rice to cook for so many people and whether to cook white rice or "nasi minyak". In the same cross-examination he said also he had handed the responsibility of cooking to another person in Kampung Repah. These are inconsistent propositions in the same testimony. The topic for discussion is not such a difficult problem that it could not be solved by someone from Kampung Repah itself.

(b) Another reason given by Rahmat Satiman for stopping at Md. Ajib's house on April 13, 1982 was to hand over the invitation cards for the wedding personally to Md. Ajib and also to hand over other cards to be sent by hand and by Md. Ajib to other friends. This too is highly improbable because if Md. Ajib was a close friend it would have been a normal act of courtesy that he would be invited much earlier than April 13, 1982 for the wedding on April 17, 1982 because there is evidence that the wedding date had been fixed as early as January/February 1982 and wedding cards had been printed and sent out to outstation friends as early as February/March 1982.

Another aspect of Rahmat Satiman's *alibi* in Johor Bahru which is also highly improbable is the "kenduri" in Omar Jayadi's house (DW 36). Although DW 36 is only a grass cutter with the Municipality Johor Bahru he was a clever witness in the sense that he answered all questions promptly without hesitation and as a result made a number of inconsistent statements pertaining to the "kenduri" which are very difficult to reconcile. First, he said the "kenduri" was a "doa selamat"

for his daughter who was going to a secondary school, English College, Johor Bahru. He also said the "doa selamat" had been planned on April 9, 1982 which was on Friday being the closing date of the school and that he had planned the "kenduri" to be on the following Tuesday which was April 13, 1982. In his cross-examination however he said that the "kenduri" was held in honour of his daughter going to a secondary school as a clerk transferred from English College to Sekolah Kebangsaan Majidee, Johor Bahru and that he was grateful for the transfer because the daughter saved $70 in bus fare. A little while later he said that the daughter had not yet been transferred and that she was transferred only in January 1983. Finally in re-examination he said that he chose Tuesday because that was the daughter's birthday.

Reading DW 36's evidence together with the evidence of Hj. Kasbun (DW 34) and his grandson, Salleh (DW 35) (both of whom did not significantly specify the date of the "kenduri") it was more probable that there might have been a "kenduri" held some time in April 1982 as stated by Hj. Kasbun but it was certainly not on April 13, 1982.

The other aspect of Rahmat Satiman's *alibi* is his diversion to Kampung Serkat in Pontian on April 13, 1982 which I also found difficult to accept as probable. This is because of the many material contradictions between the evidence of his sister, Zaleha (DW 32), Rahmat Satiman and Cikgu Ramli (DW 33). In fact DW 32 did not really remember the date or the month that Rahmat Satiman took her from Pontian to Johor Bahru. From her evidence it is clear that DW 32 did not know the date or the month. Contrary to what Rahmat Satiman had said, DW 32 testified that in her absence one Idris, her neighbour staying closer to her than Cikgu Ramli, took care of her house and not Cikgu Ramli. Cikgu Ramli (DW 33) was an evasive witness who was not even willing to disclose the distance from his house to the house of DW 32 (he only said "three lots away"). It is obvious from his evidence that he was only trying to help establish an event that did not take place on April 13, 1982.

Except for Md. Ajib and his wife (DW 29, DW 39), Tunku Besar Tampin (PW 28), the two members of the staff of Maktab Adabi Maharani in Muar (DW 30, DW 31), Cikgu Ramli, Hj. Kasbun, Salleh and Omar (DW 33, DW 34, DW 35, DW 36), the rest of the witnesses for the *alibi* of Rahmat Satiman were his own relatives whose testimonies are neither impressive nor satisfactory.

The other relevant dates and times in respect of which Rahmat Satiman's witnesses also testified were April 10, 1982 at 10.30 a.m. and April 11, 1982 at 11.30 p.m.

According to P101 Rahmat Satiman on April 10, 1982 at 10.30 a.m. went as agreed to Tampin UMNO House to see Dato Mokhtar. It was at this meeting that he said that Dato Mokhtar became angry and yelled at him for hesitating in the plan. Then Rahmat Satiman said he gave an undertaking to get a bomoh.

Rahmat Satiman brought Tunku Besar of Tampin (DW 28) to testify that some time in the month of April 1982 Rahmat Satiman came to his office to personally invite him to the daughter's wedding on April 17, 1982. The Tunku Besar also said that Rahmat Satiman left his office at "nearly 10.30 a.m." In my opinion even if I accept that the day referred to by the Tunku Besar was in fact April 10, 1982 there is nothing improbable about Rahmat Satiman going to the UMNO House which is also in Tampin after leaving the Tunku Besar's office and to keep his appointment at about 10.30 a.m. with Dato Mokhtar as stated in P101.

The *alibi* of Rahmat Satiman for April 11, 1982 at 10.30 p.m. was that he was at his house repairing collapsing tents as a result of heavy rain. This is supported by the evidence of Manisah (DW 42). According to P101 on April 11, 1982 as agreed Rahmat Satiman went to Dato Mokhtar's house and at 11.30 p.m. Dato Mokhtar returned with Abdullah Ambik, Nordin Johan and Yunus Ariffin. Rahmat Satiman said he went close to Dato Mokhtar and whispered to him to ask for money to go to Johor Bahru to meet "Lek" the bomoh. Whereupon Dato Mokhtar invited him to his room and handed him $300 and told him to use the balance to buy election box, if necessary.

According to the evidence of Manisah (DW 42) the "adat perkampungan" ceremony was held on April 11, 1982. She explained that the "adat perkampungan" ceremony merely means the putting up of tents, tables and chairs. It started at 8.00 a.m. and ended in the afternoon. She said it rained heavily that night and the tents were about to collapse and her father and others helped to repair the tents. No time was, however, given

by Manisah as to when the rain started and when the tents were about to collapse. The only thing she mentioned was that the rain started after "Drama Minggu Ini" on TV. Even assuming that her evidence is true (which I doubt) there is nothing improbable about the meeting between Rahmat Satiman and Dato Mokhtar at about 11.30 p.m. that night as stated in P101. He was not only a Ketua Kampung of Repah but also the UMNO chief there and as such the menial work of repairing collapsing tents could easily have been delegated to some lower person. After all in our society the Ketua Kampung or the Ketua Cawangan UMNO is a highly respectable personality in his kampung and Rahmat Satiman could not have found any difficulty in finding a volunteer to do the work for him.

The truth of P101 is affirmed not only by the failure of Rahmat Satiman to establish his *alibi* but also by the nature of his testimony regarding his visit to see "Lek" the bomoh in Scudai, Johor Bahru on April 13, 1982. In his testimony he did not deny his visit to "Lek" but merely gave another reason for the visit. In P101 it is stated that the visit was to further the plan to eliminate the late Dato Taha. In his testimony the visit to "Lek" was partly to invite the bomoh to Manisah's wedding and partly to get the bomoh's assistance to ensure the victory of the Barisan Nasional in the 1982 general elections in Tampin. He said "Lek" advised that it was not necessary to give talisman to all the candidates but only to Dato Mokhtar since he was the candidate for the Federal constituency of Tampin which included all the four State constituencies. He said he got the talisman and "kemenyan" for Dato Mokhtar and gave them to him on April 16, 1982. It seems to me that the version given in his testimony as to why he visited "Lek" the bomoh in Johor Bahru is too ridiculous to be accepted as true because he said that no one had asked him to do all these. Why then should he impose upon himself a task which no one expected him to do.

Thus looking at the evidence objectively Rahmat Satiman has in my opinion failed on the balance of probability to establish his alibi for the night of April 13, 1982 to the early hours of April 14, 1982.

The last witness called by Rahmat Satiman was one Mr. George Fassnacht (DW43). The calling of this witness was a surprise move as it had been clearly stated at the commencement of the defence proceeding that the defence of Rahmat Satiman was one of alibi and separate from the defence of Dato Mokhtar. Be that as it may Mr. Fassnacht went into the witness box. Mr. Fassnacht was brought to challenge the evidence of Mr. Gee (PW9), the government chemist. DW43 is a self-styled "private firearms expert" from the USA.

There are three factors which one would not fall to notice with regard to Mr. Fassnacht. First, earlier in the proceeding defence counsel for Dato Mokhtar, Mr Jagjit Singh, applied for permission of the court to release the exhibits pertaining to the firearm, namely the gun (P88), the evidence bullets and casings (A and A1, B and B1) to be examined by Mr. Fassnacht, and that the use of the comparison microscope from the Chemistry Department be made available to him. I asked if this person would be a witness but counsel was unable to say until the exhibits were examined. I disallowed the application for the simple reason that court exhibits should not be released to strangers. I would have no hesitation to allow a witness to examine any of the exhibits. I was also of the view that an expert should be able to give at least a preliminary opinion based on the 14 comparison photographs of the evidence and test bullets already in the possession of the defence. But strangely enough when Mr. Fassnacht finally took the stand in the witness box as DW43 no evidence was led of his opinion on the said 14 photographs.

Secondly, before the evidence of Mr. Fassnacht can be accepted as evidence of an expert I must first be satisfied as to his qualification or experience as a firearms identification expert. His qualification as stated by him in the witness box is a B.A. Degree in Government from La Salle College and his experience consisted of his posting in Aberdeen Proving Grounds in the United States, three years with the CIA and one year with the Government of Singapore dealing in "intelligence and technical" aspects of firearms. The question is – is Mr. Fassnacht peritus? Because his academic qualification has nothing to do with science and his experiences are all in foreign countries, I find it difficult to say with certainty that Mr. Fassnacht is peritus without any further proof of his qualification or experience. From his testimony he seems to know a lot about guns and other firearms but that does not necessarily make him a firearms identification expert. In cross-examination he maintained that there is no distinction between a firearms identification expert and a ballistics expert whereas it

seems to have generally been accepted by the authorities that firearms identification deals primarily with the study of microscopic marks appearing on the surfaces of fired bullets, cartridge cases and shotshell casings, whereas ballistics deals with the study of the motion of projectiles.

In any case his evidence consisted entirely of

(1) criticising the methods used by Mr. Gee and the police (Mr. Tham and Mr. Sohan Lal) in the firing and the collection of test bullets;

(2) the use of shooting box with blankets or cotton waste instead of water tank; and

(3) the alleged failure of Mr. Gee to ensure that he obtained the best available specimen for examination and comparison.

Mr. Fassnacht only visually examined slug A. I find Mr. Fassnacht's evidence neither acceptable nor wholesome enough to cast any doubt on the veracity of Mr. Gee's evidence.

The defence for Dato Mokhtar is much more intricate than that of Rahmat Satiman. Briefly Dato Mokhtar's evidence can be divided into five separate parts namely –

(1) His alibi;

(2) The attack on Atun's (PW18) evidence;

(3) The attack on Sudin's and Datin Norsiah's evidence (PW22 and PW23);

(4) The contention that the prosecution has not discharged its burden of proving that Dato Mokhtar was in custody and control of his gun (P88) at all times during the material period; and

(5) The attack on Mr. Gee's evidence (PW9).

First the alibi.

He brought 25 witnesses to support his alibi which covers the period and times mentioned in P101, namely April 8, 1982, April 10, 1982, April 11, 1982 and April 13, 1982 through to the early hours of April 14, 1982. The events on which the alibi is based and the different dates are –

(1) the ceramah held in Cikgu Ahmad bin Arshad's house (DW12) on April 8, 1982 purporting to last from 10.00 p.m. to 12.00 midnight.

(2) the Kursus Siviks Wanita UMNO at Palong Lima on April 10, 1982 purporting to last from 10.00 a.m. to 12.00 noon followed by a wedding at Palong Satu and the meeting of "Ketua Peti Undi" at Palong Dua which ended at about 5.30 p.m.

(3) the basketball tournament in Gemas on the night of April 11, 1982 supposedly to have ended only at about 11.00 p.m.

(4) the ceramah at the Hindu Temple Gemas at 8.30 p.m. followed by the ceramah at Masjid Geduk where Dato Mokhtar was supposed to have arrived at 10.00 p.m. and left at about 11.00 p.m. for Bukit Jalur.

The vital part of his alibi is the alibi for the night of April 13, 1982 up to the early hours of April 14, 1982. It is the defence case that after leaving Masjid Geduk Dato Mokhtar and his bodyguard PC Sani (DW27) left for Bukit Jalur, but after meeting Olan on the way, made a U-turn and returned to Gemas where at the Bilik Gerakan Gemas Dato Mokhtar signed a Visitors Book (D112A) which indicated the time as at 11.55 p.m. on April 13, 1982. From Gemas he left in the jeep with PC Sani back to his house in Taman Clonlee, Tampin arriving there at about 12.40 a.m. It was also the defence story that after his return at about 12.40 a.m. until the next morning of April 14, 1982 Dato Mokhtar never left his house at Taman Clonlee, Tampin. To support this part of alibi he brought amongst others Tan Chin Boon (DW11), Abdul Manaf (DW17), Rashidi (DW19), Nawawi (DW21), Suroya bin Selamat (DW22) and PC Sani (DW27).

Since the establishment of an alibi satisfactorily depends so much on the credibility of the witnesses involved, I propose to deal first with the witnesses referred to above.

First, the testimony of Tan Chin Boon (DW 11). This witness deals with two events, namely the basketball tournament in Gemas on the night of April 11, 1982 and the alibi of Dato Mokhtar on the night of April 13, 1982. There is no difficulty in accepting that there was in fact a basketball tournament in Gemas on the night of April 11, 1982. But what remains to be decided is whether it is true that Dato Mokhtar left Gemas only at 11.30 p.m. for Tampin. There is evidence that the basketball games started at 8.30 p.m. and ended at 11.00 p.m. This is also evidenced by Y.B. Mohd. Salleh (DW14) that Dato Mokhtar left before he left and that he left between 11.30 p.m. and 11.45 p.m. Since time must necessarily be approximate especially of events nearly a year

ago, the meeting described in P101 as at about 11.30 p.m. on April 11, 1982 is not improbable.

The evidence of Anthony Sim (DW5) was supposed to help establish the alibi that Rahmat Satiman could not have been at Taman Clonlee on April 11, 1982 as it was "raining heavily" was demolished by the evidence of Rashidi (DW19) who categorically denied that any Chinese man slept at the house when he was there on April 9, 1982, April 10, 1982, April 11, 1982 and April 12, 1982.

I regard DW11's evidence about his presence in Dato Mokhtar's house on the night of April 13, 1982 highly suspect because he himself said that he had no particular reason to stop at Dato Mokhtar's house. Furthermore if he had bought the Kentucky Fried Chicken to give to Dato Mokhtar or the election workers it is Manaf's evidence that Tan ate the chicken himself in the hall of the house. DW11 claimed he was in the hall until Dato Mokhtar returned. Of all the Ministry officials called to give evidence as to what happened that night at 513 Taman Clonlee, Tampin only Manaf (DW17) mentioned anything about Tan and his Kentucky Fried Chicken. Nawawi (DW 21) mentioned the presence of Tan that night in the house but there was no mention of his eating Kentucky Fried Chicken. Tan said he was in the hall until Dato Mokhtar returned. PC Sani (DW27) categorically stated however that on arrival at Taman Clonlee he entered the house and the people he saw were Ali Ngah, Olan, Rashidi, Manaf, Ismail Mat, Salleh and Nik but no mention of Tan. Rashidi (DW19) also described persons in the hall of the house just before the return of Dato Mokhtar but did not mention the presence of Tan. Thus if according to Manaf, Tan was present in the house eating his Kentucky Fried Chicken in the hall it is unlikely that such a sight is not remembered by all the others. Manaf admitted in his cross-examination that he did not say anything about Tan with his Kentucky Fried Chicken in his statement to the police.

The core of the evidence of alibi of Dato Mokhtar for the early hours of April 14, 1982 is contained in the evidence pertaining to his alleged massage and meeting of the Ministry officials in his bedroom purportedly around 1.30 a.m. to 2.30 a.m. Directly related to the alleged meeting of officials with the Minister was the alleged visit of Dato Mokhtar to Penajis where it is said that he met Manaf (DW17). Indirectly related to this same meeting of officials with the Minister was the signing of the Visitors Book (D112A) at Bilik Gerakan Gemas on April 13, 1982. Since all three events are inter-connected I will deal with them together.

First, the alleged meeting between Dato Mokhtar and Manaf at Penajis. According to Dato Mokhtar in his evidence in the afternoon of April 13, 1982 he drove a jeep (which he found in front of his house meant to be used for the election) to test-drive it and proceeded to Kota and then to Astana Raja through Kampung Tiga Nenek and then to Kampung Legoh Ulu where he stopped at a coffee shop. After that he went to Bilik Gerakan Astana Raja and from there he visited a Risda project and was invited to taste hot "dodol" by a villager who was preparing it for the wedding of his daughter. Then he drove alone to Penajis where he met Manaf (DW17) who reminded him to go home early as the Minister had a "ceramah" at Geduk.

In my opinion his visit to Penajis and the meeting with Manaf never took place for the following reasons. Manaf in his statement to the police did not mention he visited Penajis and did not put Penajis as a place he visited in his claim for mileage allowance for April 1982 although in his evidence he said the visit was official and that the total mileage in the claim is important. Secondly, he said he reminded Dato Mokhtar of his "ceramah" in Masjid Geduk that evening because he remembered seeing it referred to on a blackboard in the house of Taman Clonlee. But PC Sani (DW27) categorically stated that the blackboard in Taman Clonlee was meant only for youth activities and he had during his stay in Tampin to go to the UMNO Building to get the programmes for Dato Mokhtar. Incidentally it was also at Penajis that Manaf was alleged to have suggested to the Minister that because of several complaints about the youth civics courses, a meeting should be held that night at Taman Clonlee to which the Minister agreed. I will deal with this point later.

The Visitors Book (D112A) is produced by the defence to show that as at 11.55 p.m. Dato Mokhtar was at the Bilik Gerakan Gemas from where he proceeded home to Taman Clonlee, Tampin arriving at the house at about 12.40 a.m. I have grave doubt about the truth of D112A. First, no other Bilik Gerakan in the whole of the Tampin constituency kept a Visitors Book. D112A according to Y.B. Mohd. Salleh (DW14) was the

result of the idea of his assistant, Cikgu Kamaruddin (DW16) assigned to take charge of Bilik Gerakan Gemas. Y.B. Mohd. Salleh said he was not in favour of a Visitors Book because previously it had worked to his disadvantage because whoever came and signed their names in the book wanted repayment of expenses. So he said he reluctantly agreed to the idea of Cikgu Kamaruddin subject to confining the book only to three categories of people, namely the Ahli Jawatankuasa Bahagian, Ahli Jawatankuasa Perhubungan and those from outside Gemas. According to Cikgu Kamaruddin the object of keeping the Visitors Book was to obtain comments for improvement. In my opinion D112A is highly suspect firstly because the restriction to the three classes of persons who can sign the book defeats the very object of maintaining the book. In fact on perusal I found no comments were noted at all in the book for improvement of the Bilik Gerakan. Secondly, the names that appear in the book prior to April 13, 1982 are all familiar names. The first entry was by Abdullah Ambik and the last entry was also by Abdullah Ambik. Thirdly Abdullah Ambik signed twice but Dato Mokhtar signed only once although there is evidence that Dato Mokhtar visited the Bilik Gerakan more than once.

The so-called meeting of officials with the Minister in the early hours of April 14, 1982 is difficult to accept as true for the following reasons. Manaf (DW17) suggested the meeting purportedly to discuss implementation problems of the civics courses. But the co-ordinator of the civics courses was Suroya bin Selamat (DW22) who in his evidence said he was responsible for the arrangement and planning of these courses and the problem was only with regard to the time to begin the course so as to attract youthful audience. Accordin to him it should begin at 3.00 p.m. instead of 2.30 p.m. He also said that before the night of April 13, 1982 Manaf did not speak to him about the problem. He also said that as co-ordinator of these courses, he had received no feedback therefore could not have known of any problems. He also said in his cross-examination that before April 13, 1982 he did not receive any complaints of any dissatisfaction. What was therefore the problem which required ministerial decision in an urgent meeting at such an unearthly hour? I am of the view therefore that this so-called meeting is all fiction and that all evidence pertaining to the meeting is fabricated.

The satisfactory establishment of an alibi depends so much on the credibility of the witnesses involved. It is clear that three principal witnesses constitute the pillars of the alibi of Dato Mokhtar on the night of April 13, 1982 to the early hours of April 14, 1982. They are Abdul Manaf (DW17), Rashidi (DW19) and PC Sani (DW27). There were seven ministerial officials in all supposedly present at 513 Taman Clonlee, Tampin during the material period but other than these three principal witnesses the others are in my opinion merely props to support the testimonies of the principal witnesses. If the evidence of the principal witnesses failed to establish the alibi the evidence of the supporting witnesses must also necessarily fail.

First, Abdul Manaf (DW17). He is a 39-year old official in the Ministry of Culture, Youth and Sports of which Dato Mokhtar was and is still the Minister. Manaf was at the material time the Director of Youth (Training). Although he was stationed at the Ministry it would appear that at least throughout the election period in 1982 he was based at the rented house of Dato Mokhtar at 513, Taman Clonlee, Tampin. It was also disclosed in cross-examination that apart from other duties he also sometimes did the marketing for the house. According to him he was not invited by Dato Moktar to stay in the house but was invited by the other officers. Looking at the evidence as a whole I am inclined to the conclusion that Manaf was closely connected with Dato Mokhtar over and above the normal relationship between Minister and senior official. In the witness box Manaf did not seem to be very sure of his facts and his answers especially in cross-examination were too often punctuated by the words "Saya tidak pasti" ("I am not sure"). There are many indications in his testimony that he is not a witness of truth. For example the trip to Penajis which he claimed to be official yet he did not make any claim in the April statement of claim for mileage allowances; and there is the reason for the urgent meeting with the Minister in the early hours of April 14, 1982 which apparently concerned the timing and contents of the courses in respect of which the co-ordinator of the courses, Suroya (DW22) had had no feedback until the very night of April 13, 1982; and then there was the reminder by him to the Minister of the Minister's "ceramah" in Masjid Geduk which he said he knew from the blackboard in the house of Taman Clonlee contrary to the evidence of PC Sani (DW27). Finally the highly suspicious manner in which Manaf said he remembered the time Dato Mokhtar

came back to the house on April 13, 1982. He said Dato Mokhtar came back at 12.40 a.m. and he looked at his watch and saw it was 12.40 a.m. Then he said "this registered in my mind until today". Thus my assessment of Manaf is that he is not a witness worthy of belief.

Secondly, the testimony of Rashidi (DW17), another senior officer of the Ministry. At the material time he was the Director of Youth, Culture and Sports of Selangor. Yet strangely enough he was not in Selangor but more or less resident in Negeri Sembilan during the material period. This he admitted quite frankly when he said that in all his mileage claims as Director of Youth, Culture and Sports, Selangor he used as his permanent address the house of his father-in-law No.100 Jalan Bukit Kuda, Klang, and certified that address as his correct address even though he was resident in Negeri Sembilan. He also disclosed that his relationship with the Minister is not new. According to him he had known Dato Mokhtar even before the latter joined the government some time in 1966. He is in this regard very frank in his testimony. His friendship with the Minister continued since 1966 and that his personal relationship with the Minister is close which is hardly surprising because it is the defence story that Rashidi massaged the Minister during the so-called meeting held in the early hours of April 14, 1982. Looking at his evidence as a whole I am also inclined to the conclusion that the testimony of Rashidi is largely suspect.

Finally the testimony of PC Sani (DW27). This police constable should have been the star witness who could establish the alibi of Dato Mokhtar satisfactorily and effectively. Unfortunately PC Sani performed miserably in the witness box. Throughout the whole of his testimony, unlike Manaf's testimony which was punctuated by the words "Saya tidak pasti", PC Sani's testimony was punctuated by what appeared to me to be the uncontrollable words "if it is not in my diary I cannot remember" or words to that effect. It is his evidence apparently that every day during his stay in Tampin with the Minister in the morning the first thing he did was to go to the UMNO office in Tampin to get the programmes for the Minister for the day and these he would note down in his diary. Throughout his stay in Tampin he did not have the official pocket books but used instead a private black diary book. According to him he would note down only where the programmes were official not otherwise. In cross-examination many times he appeared confused and desperate and it was on such occasions that he blurted out the words "if not stated in my diary I cannot remember where I went". On one occasion also in cross-examination he said in exasperation "I cannot remember anything except what I have written in my diary".

PC Sani tried in his desperation to accuse Dato Rahman, the Director of CID of forcing him to change his statement "to conform to the statements given by the kampung people and the detainees". When asked he admitted however that he did not know what was said by the kampung people or the detainees. He also tried to implicate the Director of CID by accusing him of using the Quran to get the truth from him and when he refused he said the Director asked him to take the Quran home. He said Insp. Rashid was present. But Insp. Rashid (PW31) said he saw no such thing. He accused the senior police officers of torturing him by using abusive language on him and also kicking him but in another part of his testimony he said however that he was given a blank paper and was asked to sit down at a table. In one part of his testimony he said that Dato Rahman asked him to change his statement to conform to the statement of the kampung people and the detainees. In another part of his testimony he said that Dato Rahman told him it was entirely up to him. Again in one part of the statement he said he was subjected to abusive language and assault by the senior officers; in another part of his testimony he said nobody forced him and that he was not beaten up and his mind was not disturbed.

PC Sani's testimony as a whole consists of so many contradictions and inconsistencies that I can but come to the conclusion that he is hardly a witness to be believed. He was indeed a pitiful figure in the witness box. He was so unsure of so many things that it appeared to me he was completely lost on many occasions – fumbling over his pocket books and black diary whenever he was asked about any event during his stay in Tampin. In my opinion PC Sani is a pathetic case of misguided loyalty. His memory completely failed him of events other than those which he appeared to have learnt by heart. His utter confusion in the witness box was, in my opinion, because of his inability to expand the bits and pieces which he had been asked to memorise. Thus his frequent explosions whenever excited "if not stated in my diary I cannot remember". Significantly what was

noted in his black diary for April 13, 1982 were only the following events –

"7.30 p.m. – Hindu Temple Gemas
9.00 p.m. – Ceramah in Geduk
8.00 p.m. – Bukit Jalur Felda".

One would not fail to notice that if according to him he took down the programmes of the Minister in the morning the last item written down in his diary for April 13, 1982, that is, "8.00 p.m. Bukit Jalur Felda" was in all probability an afterthought, because it was scheduled for 8.00 p.m. but appeared after the item for 9.00 p.m.

My conclusion with regard to the testimony of PC Sani is that his evidence pertaining to the alibi after the ceramah at Masjid Geduk is completely false and fabricated. His version of how he was interrogated by the senior police officers in Bukit Aman cannot equally be true.

An outstanding feature in the alibi of Dato Mokhtar is the fact that apart from the principal witnesses which I have already dealt with like Manaf (DW17), Rashidi (DW19), Suroya (DW22), Anthony Sim (DW5), Tan Chin Boon (DW20) and PC Sani (DW27) whose credibility rating I consider to be extremely low, the other supporting witnesses would on the other hand appear to have close connection with Dato Mokhtar in some form or other and can therefore be regarded to have a good motive not to tell the whole truth as respects events which were in themselves true. Thus one cannot fail to notice the somewhat abnormal or unusual care and attention given to mention the exact times of arrivals and departures or the closing of functions as seen in testimonies covering the Seri Kendung "ceramah", the Kursus Wanita Palong Lima, the basketball tournament in Gemas, the Masjid Geduk ceramah and the football coaches' course closing ceremony, Tampin where times were vital for the alibi.

For the Seri Kendung "ceramah" Cikgu Ahmad Arshad (DW12) gave evidence. He is a teacher actively involved in UMNO politics since 1948 in whose house the "ceramah" was held. For the Kursus Wanita Palong Lima Putik Zaleha and Zawiyah (DW3, DW4) gave evidence. They were both Ketua UMNO Wanita of the respective Cawangan. For the basketball tournament in Gemas we have the testimony of Y.B. Mohd. Salleh whose position in the Exco Negeri Sembilan was made possible only by the vacancy created by the appointment of the late Dato Taha to the post of Speaker of the Assembly. Y.B. Mohd. Salleh was and is the deputy chief of the UMNO Bahagian Tampin and therefore second only to Dato Mokhtar in the heirarchy of the UMNO Division. The Geduk "ceramah" was supported materially by the testimonies of Cik Bon (DW8) and Hj. Bulat (DW13). Cik Bon was very active in Wanita UMNO Cawangan Geduk of which Cikgu Abdullah Ambik was the chief. Hj. Bulat was also active in UMNO politics in Geduk and he is also the cousin of Cikgu Abdullah Ambik. The evidence on the football coaches' course closing ceremony in Tampin was supported substantially by the testimony of Suroya (DW22) and Nawawi (DW21). I have already dealt with Suroya. As regards Nawawi (DW21) it is his own evidence that he is not only an UMNO member in Tampin but actively assisted in the election campaign of Dato Mokhtar and was also at the material time the treasurer of the Football Association Tampin of which Dato Mokhtar was president. As regards Anthony Sim (DW5) as I pointed out earlier his evidence of sleeping in Dato Mokhtar's rented house in Tampin was demolished by the evidence of Rashidi (DW19). At the material time Anthony Sim was assisting the accused in the election campaign in Tampin. As regards Tan Chin Boon, a sawmiller, he is a close friend of Dato Mokhtar as clearly seen in his own evidence as well as in the evidence of PC Sani (DW27). Although there is no evidence that he is actively involved in politics with Dato Mokhtar he admitted in his own testimony that for the purpose of the election in 1982 he provided two cars to be used during the campaign by Dato Mokhtar and went to see Dato Mokhtar on April 14, 1982 to enquire whether a third car was necessary. There is also evidence from PC Sani that whenever the official car of Dato Mokhtar was under repair, Tan would provide a substitute car – also a BMW – for use of the Minister.

It is not surprising therefore that right through the testimonies of these witnesses there is this fixed and emphatic assertions of exact times of arrivals and departures where times were vital for the alibi. I regard this as contrary to ordinary human conduct in relation to memory of events long gone.

The second part of the defence is the attack on Atun's (PW18) evidence. The basis of the attack is the same as that proposed at the end of the prosecution case, that is that Atun is not a witness to be believed when he said he saw five people near a white car in Gan Kee Estate on the night of April 13, 1982. The attack on Atun's

evidence now is based however on what the defence contends to be "new evidence" in the form of the testimony of ASP Ibrahim (DW23). ASP Ibrahim said that as a Special Branch officer he interviewed Atun who informed him that he could identify only three out of the five people that night at Gan Kee Estate. According to ASP Ibrahim, Atun identified Abdullah Ambik, Aziz Tumpuk and Aziz P.J.K. According to ASP Ibrahim he did not identify Dato Mokhtar.

The assessment of ASP Ibrahim's testimony must be in the light of his own admission of his relationship with Dato Mokhtar. He admitted close connection with Dato Mokhtar and one Abdul Hadi, also a member of Ahli Jawatankuasa UMNO Tampin. Looking at his evidence and that of Y.B. Mohd. Salleh (DW14) it would seem clear that he was also quite close to Y.B. Mohd. Salleh as the latter preferred to give information to him rather than to the OCPD Tampin, ASP Bahadun (PW17) despite the fact that he knew that the OCPD was more directly connected with the investigation of this case. ASP Ibrahim also admitted that he was a poker "kaki" of the Minister. Looking at his evidence on the story of Atun it is clearly noticeable that the story of Atun as given to ASP Ibrahim does not substantially differ from the story of Atun in the main trial. The only difference lies in the non-identification of Dato Mokhtar as allegedly told to ASP Ibrahim. Considering all the circumstances of the case I do not consider it justified to reject the story of Atun (PW18) as given in his own testimony solely on this so-called new evidence of ASP Ibrahim.

The third part of the defence of Dato Mokhtar is that the court should review the evidence of Sudin (PW22) and the evidence of Datin Norsiah (PW23) in the light of another new evidence in the form of the testimony of Batumallai (DW10), ASP Ibrahim (DW23), the testimony of Y.B. Mohd. Salleh (DW14) and the RTM film (D125).

According to Batumallai he was at the funeral of the late Dato Taha and he heard Sudin mentioning the description of the night caller as a man with a beard and he asked Sudin if he knew that man, whereupon Sudin said he did not know. ASP Ibrahim also testified that at the same funeral he also heard Sudin mentioning the description of the night caller as a male Malay with beard, moustache and sideburn wearing Malay dress and using a Pakistani songkok. The same story is also related by Y.B. Mohd. Salleh. The film (D125) also showed Sudin giving more or less the same description. In my written decision dated April 31, 1982 I have already dealt with the discrepancies between their stories and I accepted the explanation given by Sudin and Datin Norsiah as to why they withheld the real description of the night caller until after the arrest of Cikgu Abdullah Ambik. In my view the so-called "new evidence" does not alter the position.

The fourth and fifth parts of the defence of Dato Mokhtar can be dealt with together. First the defence says the prosecution has not proved beyond reasonable doubt that –

(1) Dato Mokhtar is the owner of pistol (P88);

(2) the slugs A, A1 and cartridge casings B and B1 came from P88; and

(3) P88 was at all times in the custody and control of Dato Mokhtar during the material period.

I did not think there is any doubt in the pathologist's (PW3) evidence that the bullet that went to the brain of the late Dato Taha and the bullet that went through his heart (i.e. A, A1) could singly cause his death.

As regards ownership of P88 the defence contends that the handwritten part of the gun licence (P16) has not been proved and therefore hearsay evidence and therefore there is no proof that the particulars in P16 refer to Dato Mokhtar. The defence also contends that nowhere in P16 there appears any signature of Dato Mokhtar. In my written decision dated December 31, 1982 I also dealt with P16 and came to the conclusion that P16 and its contents provided satisfactory proof of ownership of the gun (P88). The absence of the signature of the accused in P16 is only because there is no provision for any signature in a gun licence.

As regards the contention that the prosecution has not proved beyond reasonable doubt that the slugs A and A1 came from P88 this question has also been dealt with in my written decision dated December 31, 1982. The testimony of Mr. Fassnacht (DW38) playing on the words "splintered" and "dented" could not in any way cause any doubt on this point. In any case there is no evidence to suggest that there was any break in the chain of evidence with regard to A and A1. With regard to casings B and B1 the defence evidence in fact re-enforces the prosecution case when ASP

Ibrahim (DW23) testified that he saw OCPD Bahadon (PW17) picked up the casings and put them into an envelope.

Finally the question of custody and control of P88 during the material period. In my written decision dated December 31, 1982 I regarded P119 as part of the basis for coming to the conclusion that P88 was at all times in the custody and control of Dato Mokhtar during the material period. In his testimony during the defence evidence Dato Mokhtar tried to explain P119. The gist of his explanation can be summarised as follows. The answers he gave in P119 were only to the best of his knowledge and that at times during the material period he only assumed that the gun was with him by the "weight and feel" of the clutch bag in which he had put P88. Looking at the evidence as a whole his explanation of P119 cannot hold water. First he admitted that he had applied to purchase the gun for self-protection and that he was generally careful of its custody. This appeared in P119 as well as his evidence. From his evidence it would clear that he would be more conscious of the custody and safety of his gun during the election period. It is also in PC Sani's testimony that whenever he accompanied the Minister to a "ceramah" in a mosque or temple or like places he would be asked to take charge of the clutch bag and was informed by the Minister to be careful as the clutch bag contained his gun. It would appear also the intention of the defence to create some doubt on the continuity of custody and control of the gun after Dato Mokhtar returned home on the night of April 13, 1982. He said he placed the clutch bag on the table near the window. It is part of the defence evidence (although half-heartedly pursued) that many people had free access to the house at 513, Taman Clonlee, Tampin and it would be possible for someone to take the gun away and put it back on the table without the Minister knowing. There are a lot of loopholes on this proposition. First it is in the evidence of PC Sani that the window was always closed probably because the room was air-conditioned. Secondly this proposition is contrary to what was said in P119 because in that statement Dato Mokhtar categorically said that whenever he sleeps he puts his gun under his pillow. Thus his story of putting the clutch bag containing the gun carelessly on the table near the window can only be a newly invented story. Thus looking at the evidence I cannot see how the gun (P88) could have been taken out of the custody or control of Dato Mokhtar at any time during the material period.

Whenever any question on the gun was put to him it would appear to me that Dato Mokhtar was always evasive. A clear example of this is the explanation why the licence (P16) is a replacement copy. He testified that he had lost the original licence. But when confronted with the original of his own letter (P123) applying to change the address in the licence he admitted it was an error on his part. When confronted with Mr. Gee's evidence he stated that if what the chemist said is true about the gun and the slugs and the casings then it would be a "mystery" to him.

Finally, there is no evidence to suggest that the gun P88, Walther automatic pistol No. 527145 is not the same gun as the pistol referred to in the licence (P16) and the statement (P119).

There is only one other issue left and this is in respect of the question of the existence or otherwise of a friction between Dato Mokhtar and the late Dato Taha. The defence contends that the defence evidence has completely demolished any doubt as to the non-existence of a friction between Dato Mokhtar and the late Dato Taha. Quite the contrary it is my opinion that the existence of a strained relationship between the two is re-enforced by the defence evidence.

It is of course the defence story that the late Dato Taha was in no way a threat to the political future of Dato Mokhtar. But in the evidence of Dato Mokhtar himself it is clear that he felt disappointed when he was informed that the names nominated by the Jawatankuasa Bahagian Tampin were rejected by the party leadership who instead had chosen the late Dato Taha to be the candidate for the Gemencheh State seat. Y.B. Mohd. Salleh was clearly embarrassed and evasive when confronted with the question of a memorandum sent by the UMNO Bahagian Tampin to the Menteri Besar of Negeri Sembilan for the removal of the late Dato Taha from the State Exco. Y.B. Mohd. Salleh said that he did not know of any such memorandum although he admitted that he was the deputy head of UMNO Bahagian Tampin and admitted reading all minutes of the meeting of the Bahagian after Dato Mokhtar took over control of the Bahagian from the late Dato Taha in 1980. Y.B. Mohd. Salleh however agreed that there was a memorandum to put him into Exco but disagreed that it was to replace the late Dato Taha. Y.B. Mohd. Salleh in fact obtained his appointment as Exco member only when the late Dato Taha was appointed Speaker of the Assembly thereby

vacating his seat in the Exco. Looking at the evidence in their proper perspective it would seem clear to me that the late Dato Taha was an obstacle to the expansion of power and influence of Dato Mokhtar. The late Dato Taha was also a threat to Cikgu Abdullah Ambik who was one of the three nominated by the UMNO Bahagian Tampin but rejected by the party leadership in favour of the late Dato Taha. The late Dato Taha was also an obstacle to Y.B. Mohd. Salleh for only after the late Dato Taha vacated his seat in the Exco to become the Speaker of the Assembly was the seat available to Y.B. Mohd. Salleh.

The rivalry for the control of UMNO Bahagian Tampin was obviously based on practical considerations. UMNO Bahagian Tampin is one of the largest UMNO Divisions in West Malaysia. The Federal constituency of Tampin of which Dato Mokhtar is the MP also encompasses four State constituencies. UMNO Bahagian Tampin was among the first UMNO Divisions to have its own building.

Both Dato Mokhtar and Y.B. Mohd. Salleh testified that when the Jawatankuasa Bahagian Tampin discussed the nominations for Gemencheh State constituency for the 1982 general elections, Dato Mokhtar mentioned (or suggested) the name of the late Dato Taha whereupon, according to Dato Mokhtar, someone in the hall said "cukup". Y.B. Mohd. Salleh said it was Cikgu Kamaruddin seated next to Dato Mokhtar who said "cukup" followed by general voices from the meeting saying "cukup" whereupon Dato Mokhtar did not proceed any further with the matter. This story is difficult to accept as true because it is difficult to accept as probable that anyone in the Jawatankuasa Bahagian would be impertinent enough to say "cukup" to the suggestion of Dato Mokhtar (if in fact he made one) for Dato Mokhtar then was not only the chief of the Bahagian but also a Federal Minister, a member of the UMNO Supreme Council and a member of Exco of UMNO Youth. In any case the word "cukup" could not have applied to the Gemencheh constituency because there is evidence that five names had in fact been nominated for Kota whereas Gemencheh had only three names nominated.

Because the late Dato Taha was not without support it is reasonable to conclude that the late Dato Taha must be eliminated before anyone can have absolute control of Tampin. A closer look at the background would justify this conclusion. After graduating from the University of Malaya Dato Mokhtar was employed as a research officer in palm oil in Banting. He became an UMNO member of Morib in 1968 and soon he became also the Vice-President of that Cawangan. The President of UMNO Morib at that time was none other than Dato Harun Idris. With Dato Harun Idris at the helm in Morib no one could dream of taking over control of Morib at that time. But Dato Mokhtar was lucky because in 1972 the late Tun Razak nominated him to be the candidate for the Federal constituency of Tampin in a by-election. After being elected Dato Mokhtar rose fast. Because the late Dato Taha had been in virtual control of the UMNO Tampin Division for nearly 20 years it was only natural the arena was set for the conflict between the two politicians. Dato Mokhtar finally gained control of Tampin in 1980. Even the most naive of politicians could not fail to notice that the control of UMNO Tampin Division was indeed a coveted prize for the eventual control, direct or indirect, of probably the State of Negeri Sembilan itself.

Thus in my opinion the existence of friction between Dato Mokhtar and the late Dato Taha is fully re-enforced by the defence evidence.

Looking at the defence evidence it can be seen that the defence of the first accused is a clever juxtaposition of facts and fiction. The difficulty in assessing the defence evidence in respect of the alibi of Dato Mokhtar lies in the problem of separating the truths from untruths. Nobody can dispute that there was a basketball tournament in Gemas on April 11, 1982 or that there was a "ceramah" at the Hindu Temple in Gemas and at the Geduk mosque on April 13, 1982. By playing on the approximation of times upon actual events and the creation and fabrication of fictitious events upon actual events the defence story could well have made a formidable alibi. But unfortunately in this case the facade of the alibi crumbled and disintegrated as more and more witnesses took their stand in the witness box. But credit must be given where it is due. The murder of the late Dato Taha was intelligently planned, neatly executed and almost became a perfect crime.

There are a number of defence witnesses whom I have not dealt with in detail in this judgment. Some of them may appear unshaken but as stated by the Federal Court in *Muniandy & Ors.* v. *Public Prosecutor*[3] the fact that the witnesses were unshaken in cross-examination is not *per se*

an all-sufficient acid test of credibility. The inherent probability or improbability of the fact in issue must be the prime consideration.

To summarise, the misconception of the defence lies in my view in failing to look at the prosecution case in its proper perspective. The prosecution case does not depend solely or singly on the evidence of Atun bin Ali (PW18) or the evidence of Sudin bin Shariff (PW22) or Datin Norsiah (PW23) or the evidence of Mr. Gee (PW9) or the evidence of the pathologist (PW3) but the sum total of their evidence together with the evidence of the other prosecution witnesses.

After considering all the evidence adduced by the prosecution and the defence my conclusions are as follows:—

(1) It is my finding that the evidence of alibi of both the accused is completely false and fabricated;

(2) The voluntariness of the cautioned statement of Rahmat Satiman (P101) is affirmed;

(3) The truth of the cautioned statement of Rahmat Satiman (P101) is affirmed in so far as it relates to both the accused.

(4) The veracity of the evidence of Mr. Gee stands unchallenged and that means slugs A and A1 either of which singly could have caused the death of the late Dato Taha came from the Walther automatic pistol (P88) belonging to Dato Mokhtar;

(5) Dato Mokhtar was in custody and in control of P88 at all material times;

(6) The defence evidence as a whole has not succeeded in creating any doubt on the truth of the prosecution story;

(7) It is an inescapable conclusion that the charge has been proved beyond reasonable doubt against both the accused. Any other finding would be contrary to the weight of evidence.

I accordingly enter a verdict of guilty against both accused.

APPENDIX A

RULING IN TRIAL-WITHIN-TRIAL TO DETERMINE THE VOLUNTARINESS OR OTHERWISE OF STATEMENT ID 101

The prosecution is seeking to admit a cautioned statement of Rahmat bin Satiman, the third accused, which was recorded on June 23, 1982 by Ag. DSP Bashir bin Ali. This statement was recorded at the Gombak Police Station where the third accused was being detained. The defence is challenging the voluntariness of the statement.

For the purpose of this entire trial the law governing the admissibility of a statement is to be found in Regulation 21 of the Essential (Security Cases) Regulations 1975 as amended by P.U.A. 362 of 75. That regulation provides that a statement made by an accused person orally or in writing to any person shall be admissible in evidence notwithstanding any or all of the situations described in paragraphs (a), (b), (c), (d), (e), (f), (g), (h) and (i) of the regulation. In other words, such statement would ordinarily be admissible notwithstanding *inter alia* the accused was in police custody or that he made the statement to a person in authority or in the course of police investigation or that he made the statement with or without a caution being administered to him or that the statement would incriminate him. However, the Federal Court in *Johnson Tan Han Seng* v. *Public Prosecutor*[1] required that the statement must in any case be voluntary.

Where a decision has to be made as to whether a statement is free and voluntary a question of fact is involved; and that question must be decided like any other questions of fact, on the evidence. See also *Yaacob* v. *Public Prosecutor.*[4]

In my opinion the rule in Regulation 21(1) is that a statement should be excluded if it is shown or made to appear to the judge that the statement was not voluntary. It does not however require the defence to prove beyond reasonable doubt of the existence of threat, inducement or promise. A mere possibility that the statement was not voluntary is however insufficient to warrant its rejection but a probability that the statement was not voluntary would suffice to make the statement inadmissible. See also *Public Prosecutor* v. *Law Say Seck & Ors.*[5] According to *Woodroffe and Ameer Ali* a "well grounded conjecture is sufficient." But a mere "bald assertion" by the prison-

er that he was threatened, tortured or that inducement was offered to him should not be accepted as true *without more* (emphasis mine) – see *Hem Raj* v. *The State of Ajmer.*[6]

What the defence is required to prove in this case is as described in the judgment of the Supreme Court of India in *Pyare Lal* v. *State of Rajasthan*[7] as follows:

"Therefore the test of proof is that there is such a high degree of probability that a prudent man would act on the assumption that the thing is true. But under section 24 of the Evidence Act such as a stringent rule is waived but a lesser degree of assurance is laid down as the criterion. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A *prima facie* opinion based on evidence and circumstances may be adopted as the standard laid down. To put it in other words on the evidence and the circumstances in a particular case it may appear to the court that there was a threat, inducement or promise, though the said fact is not strictly proved. This deviation from the strict standards of proof has been designedly accepted by the Legislature with a view to exclude forced or induced confessions which sometimes are extorted and put in when there is a lack of direct evidence. It is not possible or advisable to lay down an inflexible standard for guidance of courts, for in the ultimate analysis it is the court which is called upon to exclude a confession by holding in the circumstances of a particular case that the confession was not made voluntarily."

It is difficult to draw clear guidelines on what the court should do in all cases where a question arises as to the voluntariness of a statement of an accused person. Facts differ from case to case. In the ultimate analysis each case has to be determined on its own merits. It has been accepted as sound principle that even where circumstances have been shown by the defence which opened a statement to serious criticism and thereby bringing its voluntariness gravely into question the court could still hold that a statement is voluntary if after appreciating the importance and significance of those circumstances the court can find that there are other facts and circumstances to completely assure the voluntariness of the statement. This principle is referred to in *Irfan Ali* v. *State.*[8]

The prosecution called Ag. DSP Bashir, the recording officer. This officer testified that the statement, ID 101, was a free and voluntary statement made by Rahmat Satiman and he never forced or in any way induced Rahmat Satiman to make the statement. He testified that he administered the caution and explained the proviso of section 112 of CPC to the accused and he said the accused understood it. No threat or promise was used. According to Ag. DSP Bashir, Rahmat Satiman looked very relaxed and narrated the statement spontaneously and continuously with only very few questions from him to clarify certain points. In his cross-examination by Mr. Manjeet Singh, Ag. DSP Bashir said "He spoke without interruptions. Only when I do not hear some of the words I asked. Not strange he spoke non-stop." The defence for their challenging evidence called Rahmat Satiman himself, Senior Assistant Commissioner Yahya bin Yeop Ishak, Insp. Aziz bin Yeop, the Area Inspection of Gombak Police Station and Mr. Deva Dass, a psychiatrist. For the purpose of adducing evidence in rebuttal the prosecution called Insp. Badaruddin, seven detectives and Ramlan bin Selamat, the man operating the canteen of the Gombak Police Station during the material period.

There are copious testimonies resulting from intensive and severe cross-examinations of almost all these witnesses. But the grounds of the defence as to the involuntariness of the statement may be summarised as follows:

(1) It is contended by the defence that the statement, ID 101, was not only involuntary but merely a reproduction of what had been coached to Rahmat Satiman by his interrogators. According to the defence Rahmat Satiman had been forced to memorise certain events and as a result of pressure imposed on him he narrated the events in the statement like a parrot. It is said that the coaching was done by the interrogation team with the aid of photographs and scripts.

(2) It is also the defence story that Rahmat Satiman was always forced to dress only in his underwear and was frequently asked to sit for long hours and to stand under a fan running at full speed. He was also prevented from performing his prayers. He was denied food and sleep intermittently. He was humiliated and abusive words were used against his wife and daughter. He is also alleged to have been slapped by Insp. Badaruddin whenever he (the accused) asked any question. He was also asked to crawl under the table and made to march in the conference room for long hours. In other words it is the contention of the defence that Rahmat Satiman was prior to June 23, 1982 subjected to generally inhuman

treatment by Insp. Badaruddin and his seven detectives and frequently deprived of sleep and food so as to break his will.

(3) Prof. Deva Dass, a psychiatrist, was brought by the defence to show that under certain pressure a person would do just as the third accused had done in this case, that is reproducing what he had been tutored or coached which in fact reflected the state of mind of the third accused as a result of all those acts allegedly perpetrated on him by the members of the interrogation team.

I will now deal with the specific allegations of the defence.

(1) Was Rahmat Satiman at any time deprived of food and drinks?

Here we have the testimonies of Rahmat Satiman himself who said that by the second week his health and mind was disturbed because he had not enough sleep and food. Rahmat Satiman also alleged that food was served to him by members of the interrogation team who sometimes snatched his food away when he was about to eat or mashed his food before handling the food over to him. As a result he could not eat the food. He further stated that during the second week he was given food "fit for a dog". The defence also called Insp. Aziz, Gombak Area Inspector, who also produced the food register, P 106. According to him it was the canteen caterer (Ramlan bin Selamat) who prepared food for prisoners on his order and the food register is maintained for this purpose. From the register Rahmat Satiman was given food every day and on one occasion, that is June 4, 1982 the lunch was provided by Insp. Aziz himself. The caterer was also called to give evidence by the prosecution. He corroborated Insp. Aziz and testified further that he himself was responsible for serving food to all prisoners and explained the procedure. He would first go to the Enquiry Office and then from there he was accompanied by a constable who opened the gates of the lock-up for him to serve the food. According to him he served food to Rahmat Satiman in the conference room a number of times. The defence seeks to discredit both the canteen caterer and Insp. Aziz by referring to the entries in the station diaries which show that meals were ordinarily served by police constables. Apart from the fact that I found at the end of the proceeding that the station diaries, D 105 A-E, are not really 100% reliable, it is difficult for me to accept that it is part of the duty of a police constable to serve food especially where a caterer is available as in this case. I have no reason to doubt Insp. Aziz's testimony. Thus I find that the allegation that Rahmat Satiman was deprived of food cannot be accepted.

(2) Was Rahmat Satiman always dressed only in his underwear?

Many witnesses, both called by the defence and called by the prosecution, testified that they always saw the accused properly dressed either in the lock-up or in the conference room. This is clearly seen in the evidence of Insp. Aziz (who was not concerned at all with the interrogation of the accused), the canteen caterer and all the detectives. Insp. Badaruddin maintained throughout that the accused had always been "well dressed". Most important evidence on this point is when the accused was brought to see SAC Yahya on June 7, 1982. SAC Yahya came to the Gombak Police Station at about 3.15 p.m. and he met the accused in the conference room and he then took the accused to Insp. Aziz's office. He was properly dressed, complete with songkok. However, he alleged that Insp. Badaruddin and his men asked him to bathe and shave and to dress properly before meeting SAC Yahya. I find this difficult to believe because if Insp. Badaruddin was under the direction of SAC Yahya with certain instructions, what is the advantage to be gained by showing to SAC Yahya that Rahmat Satiman was clean and normally dressed? Therefore this allegation is also without basis.

(3) Was or was not Rahmat Satiman prevented from performing his prayers?

Rahmat Satiman himself admitted that he is a God fearing man with a good religious background. He also said he prayed five times a day before his arrest but he was prevented from praying while in detention. All the detectives denied they prevented him from performing his prayers. In fact three detectives including Santharaj (a non-Malay) testified they escorted him to take his ablutions before prayers. The canteen caterer saw Rahmat Satiman praying several times. Insp. Badaruddin maintained that he never prevented Rahmat Satiman from praying and he said he knew Rahmat Satiman was a pious man who liked to pray. This was especially so after Rahmat Satiman saw and spoke to SAC Yahya on June 7, 1982. During his interrogation with Rahmat Satiman Insp. Badaruddin said he

also talked about general matters, about religion and about cars (as Rahmat Satiman was a mechanic) and also of family matters. Most of the detectives testified that it would be sinful to prevent a person from performing his prayers. This is common knowledge to all Muslims and it is not unreasonable to believe them in this regard. Therefore I also find it difficult to believe that Rahmat Satiman was in fact prevented from performing his prayers while in detention.

(4) Was Rahmat Satiman always deprived of sleep?

Rahmat Satiman testified that the method employed on him by his interrogators was that he was taken out for interrogation mostly at unreasonable hours and after long periods of interrogation he would then be sent back to his lock-up. But when he had hardly managed to get to sleep his interrogators would take him out of the lock-up again for interrogation. For this the defence relied on certain entries in the station diaries, D 105. It is not disputed that there were times according to the entries in the station diaries that Rahmat Satiman was put back into the lock-up in the early hours of the morning and taken out again as early as 40 minutes afterwards. Such occasions are clearly recorded on certain dates like June 1, 1982 and June 4, 1982. I have said earlier that on the whole I found the station diaries quite unreliable in the sense that the recording would appear to have been done in a slipshod manner. Two clear examples of this is to be found in Entry 3122/82 which was referred to during the reexamination of Insp. Badaruddin. This entry was dated July 9, 1982 recorded to 9.45 p.m. where it is noted that "T/KPD Gombak, (that is Dy. Area Inspector Gombak) allowed the accused to return to the lock-up". It is confirmed in evidence that there is no such officer in Gombak Police Station. A second example is to be found in the recording of the vehicle which transported Santharaj and the accused from Gombak Police Station to Jalan Bandar Police Station on July 10, 1982. According to his evidence Santharaj used motor car no. BX 3376 whereas the entry in the station diaries recorded the vehicle as motorcar no. BAY 8786. It is not disputed that the vehicle used belongs to Santharaj's brother-in-law, BX 3376, but the station diaries recorded another number.

In the station diaries whenever the accused was taken out of the lock-up it was always recorded as for the purpose of "soalsiasat", that is interrogation. Insp. Badaruddin explained that he was free with Rahmat Satiman and whenever the latter wanted to rest he would leave him. The short periods in the lock-up were for record purposes. There is also abundant evidence to show that in fact although Rahmat Satiman was outside the lock-up and in the conference room for long periods, there were occasions when he was seen lying on a bench in the conference room. These can be found specifically in the evidence of Insp. Aziz (who was not a member of the interrogation team) and Ramlan Selamat, the canteen man. Again I am unable to honestly say that this allegation of the accused can probably be true.

(5) Was Rahmat Satiman subjected during his detention prior to June 23, 1982 to generally inhuman treatment?

To answer this question properly a number of factors have to be borne in mind. First the nature of instructions received by Insp. Badaruddin on his functions. Secondly the fact that Rahmat Satiman was detained under the ISA and therefore a political detainee and not a criminal detainee. Thirdly as the learned Attorney-General suggested, and I agree with him, the status and background of the accused.

First, the instructions given to Insp. Badaruddin by his superior, SAC Yahya. According to Insp. Badaruddin on May 30, 1982 he was called by SAC Yahya at about 10.30 a.m. whereupon he received instructions to interview one Rahmat Satiman at the Balai Polis Gombak. His instructions were to obtain "security intelligence" and "public reaction and security implication" in the Tampin district and also in the State of Negri Sembilan as a whole arising from the death of Dato Taha. To assist him he was given six detectives from Kelantan and Trengganu chosen not by either SAC Yahya or Insp. Badaruddin but by the OCCI of the two States. The six detectives were taken at random from Kelantan and Trengganu where according to SAC Yahya police personnel could be spared. These six detectives were on the following day joined by the seventh detective, Santharaj, from Bukit Aman to enable two officers to be on duty at a time and Cpl. Mohd. Ismail to prepare the roster.

According to Insp. Badaruddin these detectives were instructed by him expressly to do only guard and escort duties for the duration that the third accused was under his charge. According to

SAC Yahya his instructions to Insp. Badaruddin were to go into general security intelligence arising from the incident but did not however give Insp. Badaruddin any briefing nor how to carry out his work. He just told Insp. Badaruddin to report to him from time to time. He said he chose Insp. Badaruddin because he found him to be a suitable person for the job. But both said that intelligence was "non-operational" meaning not of an urgent nature.

Insp. Badaruddin and all the detectives testified that while the functions of Insp. Badaruddin were to interview or interrogate the accused, the functions of the detectives were to guard and escort the third accused. For this purpose the detectives worked on a two-hourly shift and they slept and rested in the "surau" of the Gombak Police Station.

It is the contention of the defence that none of the police personnel was telling the truth and that what actually transpired was that the instructions to Insp. Badaruddin was to forcibly extract as much information and as quickly as possible and for this purpose he was given a team of seven detectives experienced in intensive interrogation work. In fact according to Mr. Manjeet Singh the nature of the interrogation administered on Rahmat Satiman was not unlike the Spanish inquisition.

If the defence contention is true the team would, with due respect, hardly be a suitable one. It is not challenged that although Insp. Badaruddin himself was from Bukit Aman as also was Santharaj, the rest of the detectives were chosen at random from Kelantan and Trengganu. To perpetrate intensive interrogation of the nature described by the defence would require a team of highly efficient personnel. From his own admission Insp. Badaruddin who may be efficient would seem to lack sufficient experience. In his testimony he said he had never interrogated, never prosecuted in court and never been a witness in court. As regards the detectives the position would seem to be worse. Santharaj had only been six months in D6 in Bukit Aman. Prior to that he was on beat duty and general duties in crime prevention. D/Const. Abdul Halim bin Jusoh was taken from the Anti-Narcotics Division in Trengganu and has been detective only for 1½ years. DPC Nasaruddin bin Idrus was taken from the Narcotics Division, Trengganu and had been a detective for only more than a year. Prior to that he was a police driver. D/Const. Mohd. Zainal bin Abdul Rahman was taken from CID Kota Bahru, Kelantan. In cross-examination he said his duties in headquarters in Kota Bahru was in charge of records only. Out of 17 years in the police force he spent 13 years on beat duty in Kelantan. Const. Hussein bin Hamzah was taken from CID Rantau Panjang, Kelantan. He was attached to D4 Kelantan which means dealing in serious crimes, that is, smuggling and theft. He said he had no experience in questioning people. Then there were Det. L/Cpl. Mohd. bin Ali and D/Cpl. Mohd. bin Ismail. In my view they do not constitute an impressive team for the sort of interrogation as alleged by the defence. In my opinion it is most unlikely that the interrogation team as suggested by the defence existed at all.

Because Rahmat Satiman was in fact detained under the Internal Security Act it is also highly improbable that he would be treated like a criminal. Therefore it follows that it would highly be improbable he was subjected to any inhuman treatment.

Rahmat Satiman is 54 years old and considered as an elderly man by Insp. Badaruddin and the detectives. I agree with the learned Attorney-General that in an Asian society there is still respect given to the elderly man by the younger people and this has to be borne in mind in considering the relationship between Insp. Badaruddin and Rahmat Satiman. Apart from this Rahmat Satiman is not an ordinary man. He was retired from the army after 29 years of service and he was a Sgt. Major II before he retired. Rahmat Satiman is physically better built than Insp. Badaruddin and he looks a serious man as he himself admitted. To show that Rahmat Satiman is the sort of man who can take no nonsense one has only to look at one of the early entries with regard to his detention in the station diaries of the Gombak Police Station. In Entry No. 7890 dated May 30, 1982 at 12.20 p.m. it is recorded that Rahmat Satiman informed the police that he refused to have his food until he was informed of the offence for which he was detained. Therefore he knew his rights. After all he was the village headman before his arrest and a man with considerable experience. This fact is important to consider why he failed to inform anybody at all if he was in any way ill-treated by Insp. Badaruddin and the detectives. Surely he knew that SAC Yahya was superior to Insp. Badaruddin. Insp. Aziz, who was the Gombak Area Inspector, was

not connected with the interrogation. Finally, it is unthinkable that he did not know when he met the CID chief himself, Dato Abdul Rahman at Jalan Bandar Police Station on July 2 1982, that this was a high ranking police officer to whom he could make a complaint – but he did not. I disagree that *Public Prosecutor* v. *Law Say Seck & Ors.*[5] is a complete answer to the failure of Rahmat Satiman to lodge a complaint. One would not expect Rahmat Satiman to lodge a police report in the Gombak Police Station if he was ill-treated. But having the opportunity to meet a very high ranking police officer elsewhere is a different matter entirely.

My conclusion on this question is that it is highly improbable that Rahmat Satiman was ill-treated during his detention.

(6) Was Rahmat Satiman coached to make the statement?

I do not propose to deal in length with this question because looking at the evidence as a whole it would seem to me that the allegation is too far fetched to be accepted. If I may recapitulate the instructions from SAC Yahya to Insp. Badaruddin was to obtain general security intelligence and in fact Rahmat Satiman was detained under the ISA. According to his evidence Insp. Badaruddin said he knew nothing about the events leading to the murder of Dato Taha until after he was informed by Rahmat Satiman. In fact before Rahmat Satiman drew the plan of the house (P 107) Insp. Badaruddin did not know where was Taman Clonlee in Tampin where a meeting was supposed to have been held between Rahmat Satiman, the first accused and others.

I also agree with the suggestion of the learned Attorney-General that it would be preposterous to think that senior police officers like SAC Yahya and Insp. Badaruddin could concoct a story which implicated a Minister of the Government. Finally the contents of the statement itself would show that the details are so intricate that none but the participators would be able to narrate the events in that manner.

This leaves only the testimony of Dr. Deva Dass, the psychiatrist. I think there can be no quarrel as to the theories he submitted on human behaviour under pressure. But the study of human behaviour and the human mind is not an exact science. Even if some theories have been proved true in practice he admitted he had not examined Rahmat Satiman personally. In other words the testimony of Dr. Deva Dass does not take the defence anywhere. Rahmat Satiman had been detained for more than three weeks before Ag. DSP Bashir recorded his statement. The defence submission also stressed that the length of the detention immediately preceding the statement would be sufficient to stamp the statement as involuntary unless prolonged custody can be explained. I think with respect that this is too narrow an approach to take in a proceeding of this nature. It is true that the period of detention should be considered by the judge. Other facts and circumstances should also be considered. In other words the totality of the evidence should be considered.

Our rule on the admission of confession is taken from English law. "Voluntary" means the statement has not been obtained by fear or prejudice or hope of advantage held out by a person in authority. The issue is basically one of fact. The approach is as described by Lord Hailsham in *Deputy Public Prosecutor* v. *Ping Lin*[9] as follows:

> "The Trial judge should approach his task by applying the test enunciated by Lord Sumner in a common sense way to all the facts in the case in their context much as a jury would approach it if the task had fallen to them. In the light of all the facts in their context, he should ask himself this question, and no other: 'Have the prosecution proved that the contested statement was voluntary in the sense that it was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority or (where it is relevant, as is not the case on appeal here) by oppression?'"

To summarise, for the allegations by Rahmat Satiman we have only his evidence as against the evidence of the other witnesses called both by the defence and the prosecution. I concede there were inconsistencies in some of the testimonies of the police witnesses but these inconsistencies were not on material particulars.

Considering the evidence as a whole I can find no satisfactory evidence even to suspect that there was threat, inducement or promise used on the accused. Consequently I am satisfied that the statement ID 101 was voluntary. In fact the sequence of events pertaining to the statement would seem to confirm its voluntariness. According to Insp. Badaruddin he was first informed of the events leading to the murder on June 4, 1982. He communicated this to his superior SAC Yahya. Rahmat Satiman subsequently narrated the same events to SAC Yahya on June 7, 1982. According to the

prosecution the same statement was then taped on June 9, 1982. From then Insp. Badaruddin was directed to stop all questionings except to give SAC Yahya the "biodatas". Ag. DSP Bashir recorded the statement on June 23, 1982.

I therefore rule that the statement is admissible in evidence. This ruling settles the question of its admissibility but not its truth.

APPENDIX B

DECISION AFTER SUBMISSIONS AT THE END OF PROSECUTION CASE

Because some vital issues of law and facts were raised during submissions by counsel for the defence after the close of the prosecution case, I feel that a full review of the prosecution evidence is necessary at this stage. Although this is a security case the court is not obliged to call upon any of the accused to enter on his defence unless the prosecution has proved a *prima facie* case – see *Public Prosecutor* v. *Sihabduin & Anor.*[2]

The evidence relied on by the prosecution are partly direct and largely circumstantial. April 7, 1982 was Nomination Day for candidates for the general elections of 1982. The election campaign started after the nomination of candidates.

On the morning of April 14, 1982 i.e. about a week after Nomination Day at about 6.30 a.m. a dead body was found near the gate of the deceased's house in Kampung Seri Asahan. The family members of the deceased rushed to the scene and discovered that it was the body of the late Dato Taha bin Talib, then Speaker of the Legislative Assembly of Negri Sembilan. A police report (P3) was then lodged at the Gemencheh police station.

Police personnel arrived at the scene and so also did a curious crowd. The deceased was found to have three gunshot wounds. Only two empty shells, however, were recovered from the scene (B and B1). The body was then taken to the mortuary in Tampin for post mortem.

During autopsy one slug was extracted from the brain of the deceased but the slug was dented. Another bullet, bloodstained but whole was discovered when it fell from the folds of the sarong of the deceased while the doctor was turning the body on the autopsy table. These became evidence bullets A and A1 (P18, P19). The third bullet was shown in the x-ray lodged in the thigh of the deceased which the doctor (PW3) refused to extract although the investigating Officer (PW2) insisted. PW3 refused because according to him to extract the bullet from its position would require amputation and mutilation of the thigh. Another reason which can be attributed to the doctor's reluctance to prolong the post mortem was the big crowd waiting outside the mortuary impatiently waiting to take the body away for burial.

Since the calibre of the evidence bullets was .32, all .32 pistols and revolvers in the State of Negri Sembilan were called up for surrender by the police including the pistol of the first accused on the grounds that he was in the State and in particular in the Gemencheh area during the material period. All these guns were testified and the expended bullets and shells (P27 – P87) were sent to the government chemist for examination. Also testified was the semi-automatic Walther pistol of the first accused (P88) and the expanded bullets and shells from it (P89A and P89B) were examined by the chemist.

The chemist (PW9) did his examinations and then came to a conclusion that evidence bullets A and A1 and casings B and B1 had been fired from automatic pistol (P88) belonging to the first accused.

Ten people were arrested and apparently statements were taken from nearly 300 people. Finally five persons were charged. One died before the trial commenced.

Shortly before the death of the late Dato Taha the UMNO Tampin Division had nominated Dato Mokhtar Hashim as candidate for the Parliamentary seat of Tampin. This was accepted by the Party leadership. In the Tampin constituency there are four State seats. The Tampin UMNO Division (headed by Dato Mokhtar Hashim) proposed two names for the State seat of Gemencheh. One of the two names proposed was Abdullah Ambik (PW30). The Party leadership, however, for reasons of their own, rejected both these names and nominated instead the deceased as candidate for the Gemencheh State seat. But the deceased's name had never been approved by the UMNO Tampin Division. It only stands to reason the first accused and his men were unhappy. There is evidence there had been friction between the deceased and Dato Mokhtar Hashim and obviously this friction came to a head

after Nomination Day. Events moved fast after that day.

The charge against all the four accused is that on April 14, 1982 at or about 1.30 a.m. at Kampung Seri Asahan, Cemencheh, in the district of Tampin, Negri Sembilan in furtherance of a common intention of all did commit murder by causing the death of one Datuk Mohamed Taha Talib thereby committing an offence punishable under section 302 of the Penal Code read with section 34 of the Code.

By virtue of his powers under the provisions of Regulation 2(2) of the Essential (Security Cases) Regulations 1975, the Attorney-General certified that the commission of the said offence affected the security of the Federation and therefore the case is dealt with and tried in accordance with the provisions of these regulations.

The prosecution case technically commenced with the lodging of the first information report no. 325/82 (P3) at the police station in Gemencheh at 7.05 a.m. on April 14, 1982. The real drama however unfolded about a week before the report and that was on April 8, 1982 the day following the Nomination Day. This is clear in the evidence.

The prosecution closed its case after calling 31 witnesses. One witness, PW30, was impeached leaving the prosecution with 30 witnesses on whose evidence the prosecution claims to have established a *prima facie* case on the charge against all the accused. A number of these prosecution witnesses were formal police witnesses concerning the chain in evidence of certain exhibits. But the evidence on which the whole case for the prosecution depends may in my view be classified as follows:

(a) evidence of cause of death

(b) evidence of the chemist (PW9)

(c) the cautioned statement of Dato Mokhtar Hashim (P119)

(d) evidence of the identification witnesses, namely Atun bin Ali (PW18), Sudin bin Sharif (PW22), Datin Norsiah (PW23), Liah bt. Nahu (PW25) and Mohd. Nor bin Isa (PW21).

(e) the cautioned statement of Rahmat Satiman (P101).

(a) *Cause of Death*

PW 3, Dr. Harcharan Singh, who performed the post mortem found the following wounds on the body of the deceased —

(1) a circular gunshot entry wound 0.5 cm in diameter over the right temple.

(2) a circular gunshot entry wound 0.5 cm in diameter on the front of the left chest.

(3) entry wound 0.5 cm in diameter on the upper left thigh.

(4) exit wound 0.8 cm in diameter on the left side of the lower back of the body.

Cause of death was shock and haemorrhage due to gunshot wounds. The nature of the injuries sustained was such that PW3 was of the opinion that death would have occurred within minutes. Either one of the bullets (that went through the head and the one that went through the chest) would have caused the death.

(b) *Evidence of the chemist*

The opinion of witnesses possessing peculiar skills is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without the assistance of an expert. Thus the opinion of these skilled witnesses are admissible in evidence including where the opinions rest on the personal observations of the witnesses themselves and on the facts within their knowledge. To qualify to give such evidence the witness must satisfy the court that he is indeed an expert, that he is specially skilled in the field of the enquiry carried out by him. An expert is one who is skilled in any particular art, trade or profession being prosessed of peculiar knowledge concerning the same. The witness must have made a special study of the subject or have acquired special experience on the subject. A similar question arose in the case of *R.* v. *Silverlock*[10] where handwriting was in issue, and of the person to give expert evidence Lord Russell of Killowen, C.J. said "Is he peritus? Is he skilled? Has he an adequate knowledge?"

The same test was applied by Suffian L.P. in *Public Prosecutor* v. *Muhamed bin Sulaiman*[11] where the Lord President said:

"The only question was, is Mr. Lum peritus, is he skilled, is he skilled in determining whether a particular bullet has gone through the barrel of a particular rifle. He need not become so skilled in any particular way nor by special study nor professionally. It is enough if he has had suffi-

cient experience, sufficient practical experience, to acquire the necessary skill, so that he has adequate knowledge".

If a witness is not skilled the judge will direct that his evidence be disregarded. But once it is determined that his evidence is admissible the rest is merely a question of value or weight which will be that which the court will attach to it as the court believes the witness to be peritus.

It is also said that the evidence of experts is nearly always a "weak type" of evidence and to be received with caution. This is because human judgement is fallible and human knowledge is limited and imperfect. Moreover it is not uncommon that an expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced, in favour of the side which calls him. This is the area of caution that the court must always bear in mind in assessing the evidence of an expert.

Mr. Gee (PW9) admitted that he has wide experience in the field of gun identification. He holds a B.Sc. Honours Degree in Chemistry and has had six years of experience behind him in the Department of Chemistry in this field. He had undergone in-service training under one Dr. Harcharan Singh Thara, who holds a Masters Degree in Analytical Chemistry from Imperial College, London. He had also given evidence in courts.

It was understood at the outset of the hearing of the evidence of Mr. Gee that the photographs tendered by the prosecution P108 and P109 should not be treated as the basis of Mr. Gee's findings. His findings are based on what he personally examined and found visually and under the comparison microscope. The photographs he took were only for record purposes, merely to illustrate some of the marks and characteristic lines which he saw and which he compared under the comparison microscope and some of which became the basis of his findings.

According to Mr. Gee during his six years in the Department of Chemistry he had done 62 cases of firearm examinations. In these cases 54 guns were involved and bullets and casings he examined totalled about 500 bullets and 900 cartridge cases in all. During his training on the job he had examined about 130 guns with a total number of bullets 800 in all and cartridge 720 in all. Out of the 184 guns he had examined they consisted of pistols, revolvers, rifles and shotguns.

After going through his background I have no doubt whatsoever that Mr. Gee is competent to give evidence as an expert in matters pertaining to gun identification.

On his method of working Mr. Gee testified that he would normally require five live rounds of ammunition for testfiring and comparison purposes. He said every shot fired from the same gun would leave marks of similar characteristics. In this case he did five test shots and compared them and he picked up the characteristic markings and he also managed to determine the reproduceability of almost all these markings. In practice, according to him, five rounds of shots would ensure that the characteristic markings are picked up. In addition to these characteristic lines one would also normally get stray lines on expended slugs. These stray lines are not always reproduceable from bullet to bullet even fired from the same gun. The stray lines can appear for many reasons, for example, presence of metal foul or particle or presence of rust or lines produced during manufacture. He could recognise and isolate these stray lines. The edge of cartridge case can also create marks on the bullet. When he first examined evidence bullet A he found it slightly damp and dented. There was no other damage. I personally saw the slug (A) and although there was a dent near the tip the grooves are clearly visible over a larger area of the slug. Bullet A1 was also damp but was not dented. Under the microscope he could see pitted marks which did not affect the markings of the whole bullet. The grooves were averagely the same. He gave the measurements of the grooves of bullets A and A1.

He also examined bullet casings B and B1. When ASP Sohan Lai came to see him on April 29, 1982 he advised Sohan Lai to test fire .32 semi-automatic pistols first with WW 32 brass-jacketed bullets only. He said he confined his advice to .32 semi-automatic pistols for two reasons. First he said before Sohan Lai came he had already examined bullets A and A1 and cartridge cases B and B1. They were brass-jacketed bullets and when he compared them he found the two bullets A and A1 do not have "skid marks". He explained that "skid marks" in bullets is a common characteristic of bullets fired from revolvers. The other reason was that when he compared the two cartridge cases B and B1 the individual characteristics are so similar when he matched them and he also observed that the ejector marks present in both were approximately of the same position. For these two reasons viz. the absence of "skid marks" and the presence of ejector marks on the cartridge

case he came to the conclusion that the most likely weapon used was a semi-automatic pistol. He admitted however that this was only an initial elimination process. If subsequently he was not satisfied he would go to revolvers. But events proved that to be unnecessary.

As the basis of his findings Mr. Gee said he looked for similarities in firing pin marks and breach face marks. He did not use the extractor marks or the ejector marks to form the basis of his conclusions because they are generally unreliable. According to him they are unreliable because the ejector marks and the extractor marks even when fired from the same gun are moveable. The reason is that after the cartridge has been fired, because of the recoil force the cartridge case is moved back and this cartridge case moves a slight distance before coming into contact with the ejector. Thus it has a tendency of a slight movement. There was however no pattern in the movement. Thus he did not take any measurement of it as it would serve no purpose. Whereas the firing pin mark is constant in all cartridges fired from the same gun.

The basis of his findings was severely criticised in cross-examinations. The cross-examination relied almost entirely on textbooks and photographs which Mr. Gee had himself taken for record purposes. The photographs tendered by the defence D110 and D111 (which were copies of P108 and P109) were produced to show *inter alia* that –

(1) there was no proper alignment in the taking of the photographs and therefore the photographs are unreliable;

(2) there was no proper illumination used and therefore there was no proper and clear examination done of the lines and the grooves; and

(3) there was no superimposition of pictures taken to make comparison perfect.

In my view the cross-examination based on photographs D110 and D111 are with respect misconceived. I shall however deal with them briefly. What appeared as non-alignment was the result of Mr. Gee focussing on a specified area, in the case of photograph P108E for example was taken focussing on region "a" in (P108A). Similarly photograph (P108F) sought to record same region "a" in photograph (P108A). It is common knowledge that anything outside the focus area would tend to look non-aligned. Mr. Gee maintained that there was proper illumination; the result of the photographs was probably due to dullness of the evidence bullet or cartridge compared to the relative brightness of the test bullets and cartridges. Superimposition of photographs was not done because according to Mr. Gee photographs by themselves would never make satisfactory comparison. Physical and visual comparison under the comparison microscope was his standard procedure to arrive at his conclusion.

The acceptance or otherwise of the evidence Mr. Gee must be on the basis of his findings. The photographs were however not the basis of his findings. The basis of his findings was in his own personal examinations which he explained in detail. He said he examined the test bullet casings in X61 as against evidence bullet casings B and B1. He found similar characteristic markings and came to the conclusion they were fired from the same gun. He then compared evidence bullets A and A1 with all the testified bullets in X61 and again found similar characteristics. The result was that he came to the conclusion that evidence bullets A and A1 were fired from the same gun that fired the five test bullets in X61.

Mr. Gee's basis for his conclusions can best be described in his own words in the witness box. He said:

> "I then compared evidence bullets A and A1 with all testified bullets in "X61" and again found similar characteristics. The result is that I came to conclusion evidence bullets A and A1 were fired from the same gun that fired the five bullets in "X61". With regard to casings B and B1 I first compared them and found them to bear similar characteristic markings and came to conclusion that they were fired by same gun. I then compared evidence cartridge cases B and B1 with every of the five test cartridge case in "X61". I again found similar characteristics. Basing on that I came to conclusion evidence cartridge cases B and B1 were fired from the same gun that fired the five cartridge cases in "X61".

At the conclusion of his evidence I accepted his evidence and conclusions. In fact looking at some of the photographs even a layman can identify many similar lines and ridges clearly in the photographs (Photographs 108E, 109A and F).

I am therefore satisfied that evidence bullets A (P18) found in the skull and A1 (P19) found in the folds of the sarong of the deceased the casings B and B1 were fired from the semi-automatic pistol (P88).

(C) The cautioned statement of Dato Mokhtar was

admitted as Exhibit P119. Its voluntariness was not challenged and during submission its truth was admitted. The statement contains straight forward questions and answers the material parts of which are for convenience reproduced below.

"Question: How long have you been in possession of the firearm?

Answer: I have been in possession of the firearms when I became the Member of Parliament for Tampin Division in 1972 or 1973.

Question: Did you ever lend your firearm to anyone since you possess it?

Answer: No.

Question: Do you always carry your firearm along when you go out?

Answer: I always carry my firearm along with me when I go out.

Question: Did you, during the recent general elections from April 5, 1982 to April 22, 1982 ever leave your firearm anywhere else?

Answer: During the dates mentioned I was living in a rented house at No. 513, Taman Cionice, Tampin and the gun was either in the house or with me.

Question: On April 13, 1982 was this firearm with you?

Answer: On April 13, 1982 this firearm was with me the whole day.

Question: Does that mean that the firearm was with you from morning till you went to sleep that night?

Answer: Yes.

Question: On the morning of April 14, 1982, when you got up from sleep, was the firearm still with you?

Answer: Yes, it was still with me."

The parts of the statement reproduced above are self-explanatory. The evidence of SAC Yahya (PW 29) of his conversation with the first accused also confirms that gun (P88) was in the possession of the accused on April 13, 1982 and April 14, 1982 being in the election period. Mr. Jagjit Singh challenged the probative value of (P119) as no reference was made of either the gun serial number or the gun licence. With respect it is not difficult to accept that looking at the whole evidence both Bashir and Dato Mokhtar knew what gun they were talking about in (P119).

(d) *The evidence of identification witnesses*

The first identification witness called was Atun bin Ali (PW18). He is a 55-year old man supporting himself by being a "dukun" (medicine man) and doing some kampung work. He said he attended the funeral of the late Dato Taha on April 14, 1982.

The importance of the evidence of this witness is that he claimed to have seen and identified five persons at about midnight on April 13, 1982 while he was returning home walking along an estate road. His house is about three miles from Gemencheh. According to his story he waited for transport to go home that night but failed to get any and therefore walked home. This was about midnight. Before that he had bought a candle as he had to pass through a rubber estate. It was a moonlight night. According to him he wanted to use the candle light to help him follow the path in the estate as well as to let people recognise him lest he might be mistaken for a thief. As he was walking he saw a white car and as he went near the car he saw one man to the right and another to the left and one of them was holding a torchlight and lighting the back portion of the car. He saw the back portion of the car and noticed the number plate (JJ 192). When he came near the car the two persons came towards him and they were then only at arms length from him and he asked for a light. Then somebody from somewhere in front shouted "Don't give him light". He then proceeded onwards going towards the direction of the voice and there he saw three other persons in front of the car crouching on the ground. As he was trying to get near to them, one of them waved him to go away. Realising that he was not wanted he proceeded on this journey home. According to him he could identify all the five persons well. The first two persons he saw in front of the car were Aziz Tumpuk (now deceased) and Nordin bin Johan (the second accused). The three persons whom he saw crouching in front of the car were Dato Mokhtar Hashim (the first accused), Cikgu Dolah (Abdullah Ambik) (PW30) and Aziz P.J.K. (the fourth accused). He said it was Aziz P.J.K. who was the one who waved him away. According to him the night was a moonlit night. This seems to be corroborated by the Director of Topographical Survey (PW26) who has made a study of astronomy and the Assistant Director of Climatological condition to the Malaysian metereological services (PW27). According to PW26 the night of April 13, 1982 had a three-quarter moon and the moon rose on April 13, 1982 at 11.13 p.m. and set on April 14, 1982 at 10.42 a.m. for the Gemencheh area. According to PW27 there was no record of rain in the Gemencheh area from the midnight of April 13, 1982 until 3.00 a.m. on April 14, 1982. According to him there was in fact no re-

cord of rain throughout the country during the material period. PW27 produced a radar chart (P118) showing no rain observed in the State of Negri Sembilan during the material period.

It is pertinent to note that all the five persons that PW18 saw and identified that night in the estate were according to him no strangers to him. He said he had known Aziz P.J.K. for more than 10 years and they were friends and used to play "Machok" together. He had known Aziz Tumpuk for more than 10 years and had known Nordin Johan for more than 5 years. He knew the first accused as a Minister; he voted for him in the previous election and had posters of his photograph in his house and he knew Abdullah Ambik for more than 10 years.

PW18 is a local resident and he testified that the distance between the spot where he met the five persons with the white car and the deceased's house is about 3½ miles.

The defence vigorously challenged the evidence of PW18 on the following grounds:

(1) He is not a witness of truth because he was a habitual gambler and information given to the police was for the purpose of procuring the reward advertised by the police.

(2) The story given in his evidence was an afterthought because he only informed what he saw on the night of April 13, 1982 to OCPD Tampin, Bahadon (PW17) on April 26, 1982 that is nearly two weeks after the night he claimed to have seen the white car and the five persons he identified.

The first ground of the defence cannot be accepted because although PW18 admitted he played "machok" with Aziz P.J.K. he said he only betted but did not play as he did not know how to play. He said he did not know of the reward. In any case this is in my view irrelevant. As regards the second ground I accept the reasons given by the witness for delaying his information to OCPD Tampin. According to him he attended the funeral of the late Dato Taha and while standing around he heard a conservation between an old lady (Liah bt. Nahu, PW25) who was telling the other ladies that the night before she had seen a big white car coming from the direction of the main road, made a turn and parked near Sudin's shophouse near the gate of the deceased's house. She then heard gunshots.

It must have been obvious at the time of the funeral that the late Dato Taha had died of gunshot wounds. So PW18, a simple kampung man he was, started to think. It is best to refer to his own evidence on this which is as follows:

> "I knew Dato Taha before he died. I had not been to his house before his death. I had not met Sudin before Dato Taha's death. At the scene there were many policemen and kampung people. When I attended the funeral I did not know how he died. But I heard from an old lady a white car came up to front of deceased's house and she heard gunshots and after the shots the car left the place. She was talking to her friends. I overheard. She heard 2-3 shots. This was while I was attending the funeral.
>
> I kept silent for two weeks because I was thinking of the story of the old lady of a white car in front of Dato Taha's house. I was thinking he was a Minister and I am a poor person. He could harm. I was afraid".

I accept his explanation. I also found PW18 to be a consistent witness, unshaken by very severe cross-examinations.

Application to impeach the credit of this witness was made purporting to be under section 155(c) of the Evidence Act firstly by Mr. Sri Ram because he said he had a "hunch" that there should be a difference between the Statement to the police and the evidence in court in respect of the event of the night of April 13, 1982. I refused the application to be without basis because all along PW18 admitted he gave information to OCPD Tampin but denied he had told a different story. A similar application by Mr. Ponniah was also refused as was also the application of Mr. Manjeet Singh on the same grounds. What is implicit in *Husdi* v. *Public Prosecutor*[12] is that there is a material contradiction which is unexplained by the witness. Here PW18 said he kept silent for a few days until he had thought seriously about what was told by the old lady to her friends within his hearing about the big white car seen just before the shots were heard in front of her house. PW18 explained the delay satisfactorily because as he said a Minister was involved and he was only a poor man and therefore had to be cautious.

The second identification witness called was Sudin bin Sharif (PW22). He is 64 years old and father-in-law of the deceased staying in a room near the kitchen of the house of the deceased at the material time. His evidence is straightforward. According to him on April 13, 1982 at about 8.00 p.m. the deceased left the house by car. Then at about 8.30 p.m. someone came to the house and called out his greeting "assalamualaikum" to

which the witness responded and then he opened the kitchen door and saw the caller. PW22 went towards the caller and they shook hands and spoke to each other. According to PW22 he had know the caller for about 20 years as Cikgu Abdullah Ambik. When the caller was told that the deceased was not in he went away. The deceased returned at about 12.45 a.m. This PW22 knew as he himself opened the same door to let the deceased in. Then the deceased's car was driven away by the driver. Shortly after the same caller came again and gave his greeting "assalamualaikum" three times. PW22 also answered and opened the kitchen door but did not see the caller there. Then he looked towards the hall of the house and he saw the caller in the hall, seated. According to PW22 the caller the second time was the same man, Abdullah Ambik. After that PW22 went back to his room and was lying down but did not sleep. At about 1.30 a.m. he heard a shot followed by two other shots. He however did not get up or do anything as he said he did not suspect anything. Only at 6.30 a.m. the following morning was he awakened by his grandson, Adlan bin Khamis (PW24) who said that there was a dead body near the gate of the house. All those in the house went to the scene and when Datin Norsiah (PW23) recognised the body of her husband, she screamed and went towards the body. The position of the body, according to PW22, was as shown in photograph P11E.

The challenge of the defence on the evidence of PW22 is on the following grounds:–

(1) He was an interested party as the deceased was his son-in-law.

(2) Like Atun bin Ali (PW18), this witness (PW 22) also did not inform the police immediately of the identity of the night caller. Asked by the defence if he gave a different story to the Press on April 14, 1982 he said he cannot remember if at all he said anything as his mind was disturbed that day. In fact he said he cannot remember if he spoke to any reporter. He denied that Abdullah Ambik was the person suggested to him by the police as the night caller. He was emphatic that the caller on both occasions was Abdullah Ambik who was also no stranger to him. He explained the delay in identifying Abdullah Ambik to the police because of fear. PW22 said that he was afraid that if "they" could kill a person of the standing of the late Dato Taha who knew the Prime Minister, what about him, an ordinary person.

I thought his explanation was also reasonable to explain the delay as in the case of PW18 having regard to the personalities involved in this case.

Thus I rejected both grounds of the challenge of the defence on the testimony of this witness.

The third identification witness was Datin Norsiah bt. Othman, widow of the deceased (PW23). Her evidence is also straightforward. She had been living and is still living in Seri Asahan, Gemencheh. On the night of April 13, 1982 after the husband left to go to a "ceramah" at Bukit Rokan, she went to her bedroom and after reading a newspaper went to sleep. She was awakened only when the husband returned at 12.45 a.m. She said she knew the time because her husband said so when he came into her room. A little while later she heard someone gave the greeting "assalamualaikum" three times. She said her husband went to open the front door and the caller came into the house. She got up and stood at the door of the bedroom and was standing just a little outside the door when she saw Abdullah Ambik seated in the hall. At that time she could not see the husband because the husband was hidden from her view by the curtain. As was her habit when there was a visitor, she went down to the kitchen to make coffee which took her about fifteen minutes and then she went up with the coffee but found both the husband and Abdullah Ambik no longer in the hall. She then sat at the front door for five minutes but could not see anything outside. Then she went back to her bedroom to lie down and then she heard a shot followed by two other shots. She thought people were shooting musang, so she did not bother and then fell asleep. Only the following morning was she informed of a dead body at the gate of the house which later turned out to be that of her late husband.

In her testimony she remained emphatic that Abdullah Ambik is no stranger to her or to the house. She had known him for seven to eight years and seven to eight years previously Abdullah Ambik used to come to the house but after that Abdullah Ambik stopped coming except on the night of the incident.

In her cross-examination by the defence she denied that it was her father (PW22) who suggested the name Abdullah Ambik to her as the night caller. In her testimony she said she knew personally that the caller that night was

Abdullah Ambik. But she did not inform any police officer. Some time after the death of her husband she denied being shown any police sketches. She denied she identified anybody else except Abdullah Ambik because she said she recognised Abdullah Ambik and nobody else. Although she had not seen Abdullah Ambik for seven or eight years she had always seen him in town or at the market every Sunday.

On the morning the dead body was discovered, O.C.S. Gemencheh (PW15) was the first to arrive at the scene. Datin Norsiah admitted that she told the sergeant she could not recognise the caller. In her testimony in court she said that she was afraid that her family would be threatened. After some time she heard that Abdullah Ambik was arrested and then she decided to reveal Abdullah Ambik's name as the visitor. This witness was emphatic from the beginning to the end of her testimony that the caller on the fateful night was Abdullah Ambik and not Haji Razak or anybody else. Her explanation for not informing the police of the identity of the night caller immediately after the incident can be summarised in the passage of her own testimony which read as follows:—

"I did not tell the OCS and others because of fear. The fear was I was scared I would be threatened. If my husband in his position that could happen to him like that what about me. Apart from my husband, there were my mother and my father and children. They are school children. Abdullah Ambik used to visit my house 7-8 years ago. Apart from that night of April 13, 1982 he did not come. However I used to see him in town and market".

As regards all these three witnesses it is important in my opinion to draw a distinction between recognition and identification. Recognition is more reliable than mere identification. Recognition of a person known to the witness would be more reliable than identification by a witness of a stranger. Some pertinent questions were put by the Lord Chief Justice in the judgment of the Court of Appeal in *Raymond Turnbull & Ors.*[13] appearing at page 137 as follows:

"Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation?

At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long had elapsed between the original observation and the subsequent identification to the police?"

The next identification witness is Liah bt. Nahu (PW24), a 59-year old lady whose house is close to the deceased's house across the road. A description of what she saw in the early hours of April 14, 1982 was brief. She was alone in the house. Then she saw a car coming from the direction of the main road Jalan Gemas. She then went to the window of her house from which Sudin's shophouse could be seen. She saw that the car was white and the time was about past 1.00 a.m. The car made a turn and stopped near the shop. The deceased's house was behind the shop and the shop was outside the fence of the deceased's house. When the car stopped she said the car was facing the Gemas road. Then she saw two men came out of the car and walking up and down. At first she thought they were thieves but after a while since nothing happened she went to bed. While about to fall asleep she heard shots. According to her she heard two shots but did not hear the third one. She continued to sleep until morning. A description of the car was that it was a white car similar to the deceased's car and also about the size of the deceased's government car which at the material time was a Mercedes Benz 2400.

The last witness which can also be classified as identification witness is PW21. Mohd. Nor bin Isa, a 41-year old director of companies. A cursory look at his background and his apparent hostility towards all the accused would reveal that this witness is clearly partisan probably because of his very close relationship with the deceased which is understandable. He served the deceased as personal secretary-cum-personal representative when the deceased was the head of UMNO Bahagian Tampin from 1960 to 1980. In 1980 the deceased lost the leadership of the UMNO Bahagian Tampin to Dato Mokhtar, the first accused. I have to consider the testimony of this witness with caution but I would not reject his testimony wholly. In my view those parts of his evidence could be acceptable if they find corroboration either in the cautioned statement (P101) of Rahmat Satiman or the evidence of other witnesses. These parts of PW21's testimony which can be accepted are—

(1) The strained relationship between the deceased and the first accused;

(2) The deceased left the Gemencheh election office for home at past 12.30 a.m. on April 13, 1982 and that the house of the deceased is about 2-3 miles from the office.

(e) *The cautioned statement of Rahmat Satiman*

The prosecution sought to admit a cautioned statement of the third accused, Rahmat bin Satiman. The statement was recorded on June 23, 1982 by Ag. DSP Bashir bin Ali. The statement was recorded at the Gombak Police Station where the third accused was being detained. For the purpose of this trial the law on the admissibility or otherwise of this cautioned statement is contained in Regulation 21 of the Essential (Security Cases) Regulations 1975 as amended by P.U.A. 362 of 75. Under Regulation 21 a statement made by an accused orally or in writing to any person shall be admissible in evidence notwithstanding any or all of the situations described in paragraphs (a), (b), (c), (d), (e), (f), (g), (h) and (i) of the regulation. However, the Federal Court in *Johnson Tan Han Seng* v. *Public Prosecutor*[1] required that the statement must in any case be voluntary. The defence forthwith challenged the voluntariness of the statement.

The prosecution evidence to prove that the statement was free and voluntary consisted of the evidence of the recording officer himself, Ag. DSP Bashir and other witness called both by the defence and the prosecution. The recording officer testified that the statement (ID 101 later admitted as P101) was made freely and voluntarily. This officer also testified that he administered the caution and explained the proviso of section 112 of the CPC and said that the third accused understood it. He used no threat and gave no hope or promise in return for the statement. According to the officer, Rahmat Satiman looked very relaxed and in fact narrated the statement spontaneously and continuously with only very few questions from him to clarify certain points.

The voire dire produced copious testimonies as a result of intensive and severe cross-examinations of almost all the witnesses called to testify. To put them shortly the grounds on which the defence relied to show involuntariness in the cautioned statement were merely as follows:–

(1) The statement was not only involuntary but merely a reproduction of what had been coached to Rahmat Satiman by his interrogators.

(2) It was also contended by the defence that Rahmat Satiman was subjected to generally inhuman treatment.

(3) Finally Prof. Deva Dass, a psychiatrist, was brought by the defence to show that under certain pressure a person would do just as the third accused had done in this case, that is capable of reproducing what had been coached or tutored on him thus reflecting the state of mind of the third accused as a result of the alleged cruel acts perpetrated on him by the interrogation team.

After considering the evidence as a whole I rejected all the allegations of the defence to be without foundation. My detailed reasonings are contained in my ruling issued on November 8, 1982. In fact at the conclusion of the trial-within-trial I found no satisfactory evidence even to suspect that there was threat, inducement or promise used on the third accused. I was also satisfied on the facts disclosed in the evidence an interrogation team as described by the defence could not have existed.

That ruling however dealt only with the admissibility of the statement. In my ruling dealing with the question of the probability or otherwise of the contents of the statement to have been tutored or coached on the third accused I referred in one sentence on the contents of the statement itself to show that the details of the narration are so intricate that none but the participators would be able to narrate the events in that manner. To answer the question posed by the defence it was in my opinion permissible for me as the trial judge to go even into the contents of the cautioned statement to determine the voluntariness of the statement. It is always difficult to draw a line of the theoretical and philosophical boundary between matters going to admissibility and matters going to weight and cogency. I alluded to the sequence of events in the cautioned statement merely to show the improbability of involuntariness without however touching weight or cogency. See also *R.* v. *Robson and R* v. *Harris*.[14]

The first statement of Rahmat Satiman was recorded by Ag. DSP Bashir bin Ali on June 23, 1982 (P101). On July 9, 1982 that is the day immediately before Rahmat Satiman was charged in court, he made another statement to another police officer (D102). The second statement carries his defence of alibi.

Before I deal with the central issues I would like to deal with some aspects of the prosecution case to complete the record:–

(1) *The Impeachment of Abdullah Ambik (PW 30)*

It is in the evidence of Sudin bin Sharif (PW 22) as well as the evidence of Datin Norsiah (PW 23) that the person who called at the house of

the deceased on the fateful night of April 13, 1982 was Abdullah Ambik. The evidence of both these witnesses has been dealt with. When however Abdullah Ambik himself was called by the prosecution to give evidence (as PW30) he turned "hostile". He is a 54-year old teacher of Sekolah Kebangsaan residing in Gedok. Cemencheh with an SPM qualification. Apparently he has been the Ketua Cawangan UMNO Gedok since 1965 until today.

At the outset three things should be noted about this witness. First he is the son-in-law of the fourth accused, Aziz bin Abdullah. Secondly, he was one of the two names recommended by UMNO Bahagain Tampin (of which Dato Mokhtar, the first accused was the Chief) to the State UMNO Liaison Committee as the proposed candidates for the State seat of Gemencheh in the 1982 elections. Thirdly, on the second day of his examination he stated that as a Muslim he spoke the truth in court. I am not clear what his motive was for saying this for it is well settled in Muslim jurisprudence (as far as I know) that for a Muslim to qualify as a witness worthy of belief he must, besides being a Muslim in name only, satisfy several stringent rules like "abstaining from committing capital sins" and "not in the habit of committing minor sins" – see page 515 of *Mihaj-et-Talibin*. In our system of administration of justice the credibility of a witness depends on a slightly less complicated guideline. In fact the Evidence Act does not purport to lay down any rule as to the weight to be attached to the evidence of the witness when admitted. Generally in practice as far as witnesses are concerned it is left to the judge who hears and sees the witness to attach to their evidence the weight it deserves from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements. See also *Woodroffe Ameer Ali*.

In Abdullah Ambik's testimony he denied that there was any friction between himself or the late Dato Taha or between the late Dato Taha and Dato Mokhtar. On further questionings in his examination-in-chief he gave evidence unfavourable to the prosecution and denied knowledge of the plan and killing of the late Dato Taha. The learned Attorney-General then produced a statement under section 112 of the CPC PW30 admitted he had made to DSP Manaf during his detention (P120). He made a second statement also to DSP Manaf on September 7, 1982 after his release from detention, which statement would also appear to be consistent with the first statement.

On examining P120 I found there are indeed material contradictions on the description of events on April 6, 1982, April 8, 1982, April 11, 1982, April 13, 1982 and April 14, 1982. PW30's explainations for the contradictions between his statement in the witness box and his statement to the police can be summarised simply as follows:–

(a) His answers in the statement to the police were based on questions by the police and some of the facts he stated there he knew them to be lies.

(b) After one and a half months in detention and after telling the police the truth which he said the police consistently rejected and since he could not stand the punishment and humiliation caused on him by the police he just gave his answers based on the questions put to him by the police. He was released on July 10, 1982.

I found it difficult to accept the explanations of PW30 on the contradictions because he gave two separate but consistent statements to the same police officer which were totally different from what he said in the witness box. The first statement was given while he was in detention but the second statement was given almost two months after his release from detention. It is also obvious that he changed his story after being subpoenaed as witness for the prosecution and after being visited by two lawyers for the defence (Encik Manjeet Singh and Encik Abu Zahar). Apparently it was only after receiving the subpoena did he lodge a report on his statement at the Seremban police station on October 9, 1982, which again was three days before the trial commenced.

Defence had earlier objected to the admission of the statement (P120) on the grounds that voluntariness was in issue. I overruled the objection on the following grounds –

(1) PW30 himself admitted making the statement and only denies its truth;

(2) P120 is in this case admitted not as evidence in the main trial but only as a statement to

impeach the credit of PW30 in an impeachment proceeding;

(3) Exhibit P120 is in any case admissible at the direction of the court under regulation 21(3) of the Essential Regulations.

At the conclusion of the impeachment proceeding I ruled that the credit of PW30 was successfully impeached.

Two important principles are involved in an impeachment proceeding. First, where the witness does not admit making the previous statement then the previous statement must be proved. In this case PW30 admitted making the statement but only denied the truth of the contents – see also *Muthusamy* v. *Public Prosecutor*.[15] The second principle is that when a witness is shown to have made a previous statement inconsistent with the evidence by the witness at the trial, the evidence given at the trial shall be disregarded as unreliable. If the trial is with a jury when the jury should also be directed that the previous statement does not consitute evidence upon which they can act. See *R.* v. *Morgan*.[16]

(ii) *Was it two shots, three shots or four shots?*

Three witnesses testified that they heard gunshots at or around 1.30 a.m. According to his testimony Sudin bin Sharif (PW22) after returning to his bedroom and was about to sleep heard three shots. Datin Norsiah (PW23) in her testimony said that after preparing coffee for the husband and the visitor waited for about five minutes at the door and then returned to her bedroom. Shortly afterwards she heard three shots. Liah bt. Nahu (PW24) in her testimony said that she saw through her window a white car similar to the government car of the deceased and then saw two men pacing up and down. After seeing that nothing happened she went back to sleep. As she was about to fall asleep she said she heard two shots. PW3 who performed the post mortem found three entry gunshot wounds although two bullets were discovered from the body. One bullet was clearly seen in the x-ray lodged in the thigh tissue but was not extracted.

Thus on the evidence it is only PW24 who said there were two shots fired. She was an old woman and when she heard the shots she was already falling asleep. Therefore looking at the evidence as a whole including the cautioned statement of Rahmat Satiman (P101), there is no doubt that the number of shots fired was three and not two. The defence is apparently anxious to show that it was two shots and not three because it is the defence theory that the late Dato Taha was killed elsewhere and the body was dumped in front of the gate of his house. The theory is that as they dumped the body the assailants fired two shots in the air and that is the reason why they say only two shells were recovered by the police at the scene. But with the respect this theory is difficult to accept and is inherently illogical. For if a murderer or murderers had killed a victim elsewhere and wanted to dump the body at a certain place the most reasonable thing to do was to dump the body at the scene quietly and leave the scene as fast as possible. But the evidence of Liah bt. Nahu is that the white car came and turned around and parked itself near Sudin's shophouse and was there for some time before the shots were heard. Why should two shots be fired in the air just to attract attention? Therefore the theory of the defence is in my view unreasonable and cannot be accepted. Likewise there is no evidence even to suggest four shots were fired.

The central issues

(a) *The statement of Rahmat Satiman*

The central issues revolved around the statement of Rahmat Satiman (P101). It is important to be acquainted with the contents of the statement to get a clear perspective of the issues.

The first part of the first statement Rahmat Satiman deals with his background. He had 29 years experience in the army and retired as Sergeant Major II. In the army he was a soldier and part of the service served as gunner. In his background he also related his experience in UMNO politics where he was elected as Vice-President UMNO Cawangan Kampung Repah in 1980 and two years later he was elected as the head of the UMNO Branch. It was in the evidence of PW21 subsequently that it was UMNO Branch that withdrew support to the late Dato Taha amongst the 14 Branches called to the meeting before the Nomination Day.

The second part of his statement Rahmat Satiman dealt with planning and preparation. The first meeting was held on April 8, 1982 at Dao Mokhtar's house in Tampin at 11.00 p.m. when the idea of toppling the late Dato Taha came into discussion. The first accused clearly played a do-

minant role in this meeting and it was at this meeting that he told Rahmat Satiman to find the bomoh for the purpose of weakening the powers of Dato Taha and assured Rahmat Satiman not to worry about finance. It was agreed then that Rahmat Satiman was to go to Johor Bahru either on the April 13 or 14, 1982 to look for the bomoh and at the same time to invite his elder sister to attend the wedding of his daughter on April 17, 1982. The second meeting between Rahmat Satiman and the first accused was held on April 10, 1982 at 10.30 a.m. this time at the Tampin UMNO office. Apparently Rahmat Satiman was wavering in the plan whereupon he said the first accused became angry and yelled at him and said that the matter was now in the midst of implementation and he (the first accused) could not compromise. Rahmat Satiman gave an undertaking to see the bomoh. But the first accused told him to return to Gemencheh on April 13, 1982 after meeting the bomoh and getting the things necessary from the bomoh and then to return to Johor Bahru only after everything was completed. He said at that meeting he was also informed by the first accused that apart from Nordin Johan (second accused) and Abdullah Ambik (PW30) there was another person, that is Aziz bin Abdullah (fourth accused) – otherwise known as "Aziz P.J.K." – who would also render the necessary assistance if Dato Taha was aggressive. It was also at that meeting that Rahmat Satiman said the first accused told him there already existed a plot planned by Dato Rais Yatim and the late Dato Taha to defeat him (Dato Mokhtar Hashim) in the election by giving $30,000/- and $20,000/- respectively to the PAS Parliamentary candidate. This plot was also known to many other higher-ups in the UMNO hierarchy.

The third time Rahmat Satiman met Dato Mokhtar was on April 11, 1982 at Dato Mokhtar's house in Tampin. He was handed $300/-. As arranged Rahmat Satiman, according to his statement, went to Johor Bahru on April 13, 1982 at 8.15 a.m. in his car M 4170. He arrived at the bomoh's house at 10th mile, Scudai at 11.30 a.m. He was given incense (Kemenyan) and with instructions that some be strewn at the place where the late Dato Taha used to pass so as "to make him weak", some have to be burnt for the smoke to go into the compound of the late Dato Taha for the purpose of "overcoming all magical powers possessed" by the late Dato Taha and finally some of it were to be eaten or to be worn by all concerned so that "other people would obey the words and commands of these persons". After getting all these instructions Rahmat Satiman returned to Gemas at about 4.00 p.m. and while waiting for the appointed time to meet the others as arranged he divided the "kemenyan" (incense) into five parts to be handed to the first accused, Abdullah Ambik, Nordin Johan, Aziz P.J.K. and himself. As promised at about 12.30 – 12.45 a.m. on April 14, 1982 he went to the road side near the sawmill at the 12th mile and then a Mercedes car from the direction of Tampin arrived driven by Dato Mokhtar. Dato Mokhtar again gave him a warning in Malay roughly translated – "Do not try to help Dato Taha. Evil to you". When they arrived in front of the late Dato Taha's house Rahmat Satiman said he scattered the incense around Dato Taha's house and after finishing circling the house and burning the incense he saw Aziz Tumpok (now deceased) and one Ma'dan under a tree.

The third part of his statement Rahmat Satiman dealt with the actual killing of Dato Taha. He was told by Nordin Johan that Dato Taha was coming down from his house with Abdullah Ambik and Aziz P.J.K. He saw them coming and he also saw that when they reached halfway suddenly Aziz Tumpok, Ma'dan and Nordin Johan pounced upon Dato Taha and guarded him. They tied Dato Taha's hands, mouth and eyes as planned. They took Dato Taho to the front fence of his house. Then he saw first accused, Dato Mokhtar Hashim shot Dato Taha and he believed that the first shot was towards the deceased's body. The second shot was towards the late Dato Taha's head because Rahmat Satiman said he heard Ma'dan and Nordin Johan's voices saying in Malay roughly translated – "Slow to die Dato – shoot at the head, faster a bit" and it was after this that he saw Dato Mokhtar shoot for the second time. Rahmat Satiman said after that the late Dato Taha was released and he heard Nordin Johan (Second accused) asking for the pistol from Dato Mokhtar as he also wanted to shoot the late Dato Taha. After that Rahmat Satiman said he heard a shot and from the flash of the explosion he said he clearly saw the second accused firing the third shot towards the late Dato Taha.

Rahmat Satiman said he saw Nordin Johan, Aziz Tumpok (now deceased) and Aziz P.J.K. untied the bindings to the eyes, mouth and hands of Dato Taha. Then the body of the late Dato Taha was put right and after that all of them went into the car and was driven off by the second accused. He saw Ma'dan and Aziz Tumpok get into another car whose number and make he could not make

out. After that Rahmat Satiman was taken to a place where he had been waiting earlier and the first accused warned him again "Watch your mouth carefully" and handed him an envelope which contained $500/- and Rahmat Satiman then left for Johor Bahru via Jalan Tampin, Melaka arriving at Air Hitam at about 4.00 a.m. on April 14, 1982. He then proceeded to his sister's house at Kampung Majidi, Johore Bahru to fetch the elder sister back to his kampung. He arrived at his sister's house at 8.00 a.m. and after taking a bath departed at 9.30 a.m. stopping at Muar to buy vegetables and arriving at his house at about 2.00 p.m. on April 14, 1982.

The statement of Rahmat Satiman must therefore be viewed as a statement implicating not only himself but all the other co-accused.

At the end of his statement Rahmat Satiman admitted that the plan to kill Dato Taha was agreed to while they were in the car. But it can also be inferred in an earlier part of the statement with regard to the event an April 10, 1982 when reference was made by Dato Mokhtar that apart from Nordin Johan and Abdullah Ambik, Aziz bin Abdullah would also be involved in assisting should Dato Taha become aggressive.

For a proper approach to take in dealing with the statement of Rahmat Satiman (P101) it may be useful to refer to the grounds of appeal before the Federal Court in *Herchun Singh & Ors* v. *Public Prosecutor*[17]. One of the grounds of appeal against the conviction there was that the confession of the fifth accused was not a confession and therefore should not have been taken into consideration against the other appellants in the absence of other evidence clearly implicating each of them. In dealing with the question H. T. Ong C. J. said at page 209:

"We think the most convenient and logical way to deal with these appeals is to start with the confession by Ramasamy. A confession, as defined in section 17(2) of the Evidence Ordinance, "is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence". The learned trial judge held, in our view quite rightly, that the statement by Ramasamy was a confession. It told of a robbery and of his own participation therein. More than that, he merely attempted to palliate his own offence by alleging that he acted under coercion. Of him the judge said, "He may not have been the villain of the place but he did take part in the robbery".

It is my view that (P101) is a confession or at least a statement in the nature of a confession. What then is the role to be played by P101 in the prosecution case? This in my view is the crux of the question.

On the use of a confession as against the maker the position in law is clear. An accused can be convicted on his confession if the court believes it is voluntary and it is true.

Since there is evidence of a second statement by Rahmat Satiman tendered by the defence although during the trial-within-trial (D102) which denied liability, I feel bound to regard (P101) as a retracted confession. Certain Indian authorities require corroboration before a conviction can be based on a retracted confession. But in *Osman & Anor.* v. *Public Prosecutor*[18] a Federal Court decision in Singapore refused to accept the Indian authorities and adopted the view of the Malayan Union Court of Appeal in the case of *Yap Sow Keong & Anor.* v. *Public Prosecutor*[19] which was stated in these words:

"In our view the law as to the admissibility of retracted confessions in evidence is clear, and put shortly it is that an accused person can be convicted on his own confession, even when it is retracted, if the court is satisfied of its truth."

This case went up to the Privy Council as *Osman & Anor.* v. *Public Prosecutor*[20] but it would appear that the Privy Council did not disagree with this ruling of the Court of Appeal.

Even if corroboration is required for (P101) there is corroboration found in the evidence of (PW3) who conducted the post mortem of the deceased and the evidence of (PW9), the chemist, which connected the evidence bullets A and A1 and casings B and B1 to the pistol belonging to the first accused.

(P101) was again challenged in the main trial when Ag. DSP Bashir was recalled to tender the cautioned statement of the first accused (P119). This time Mr. Manjeet Singh drew attention to the apparent "lack of care" on the part of Bashir in recording P101 as compared to the recording of (P119). Several typing errors were pointed out in (P101). For example, at page 4, line 65 "Peti untu" has no meaning in Bahasa Malaysia; could it be "peti undi"? Again at page 4, line 3 from the top "meneking" which should be "menengking". By contrast according to counsel every small mistake in (P119) is initialled by Bashir. These typing mistakes in (P101) should not,

in my view, be exaggerated. They could well have caused a serious problem to the prosecution if these mistakes occur in the material parts of the statement but in my view they do not. Secondly, it should not be overlooked that (P101) was typed out by Bashir himself who is not a typist by training or occupation but a police officer. Thirdly, in the case of (P119) Bashir was taking everything in longhand and what more he was taking a statement from a Minister of the Crown. One can imagine that Bashir must have been extra careful; even then events have shown that he was not that careful either. Therefore with respect I do not regard the typing mistakes in (P101) as important enough to affect the admissibility of the statement.

Mr. Manjeet Singh during submission urged me to reconsider my ruling on the voluntariness of the statement (P101) citing *R.* v. *Watson*[20] on the power of the judge not being precluded from reconsidering such a ruling at a later stage of the trial if further evidence justifies it. But it must be noted that it is also part of the judgment in that case judges should discourage counsel from making such submissions where they are founded on tenuous evidence.

What is the evidence relied on by Mr. Manjeet Singh here? First, he referred to the so-called "admission" by SAC Yahya (PW29) that the "pressure" on Rahmat Satiman was lifted only after the tape recording was done on June 9, 1982. This, according to counsel, was corroborated by entry 9216 (on instructions of Insp. Badaruddin) and entry 9598 (on blanket) in the station diary of the Gombak police station (105D). Secondly, it was contended also that the classification at the top of the statement was changed from "A" to "B" – "A" being a witness and "B" an accused which counsel contended implies that inducement or promise had been given to Rahmat Satiman. Thirdly, the apparent "lack of care" shown by Bashir in the recording of (P101) as compared to the recording to (P119) which I have referred to earlier.

Let me deal now with the so-called "admission" of SAC Yahya. The word "pressure" was in fact put to SAC Yahya during cross-examination. It is in SAC Yahya's evidence earlier which stands unchallenged that he did not know how the interrogation was done and that he issued no instruction on that. As regards the station diaries of the police station my view has already been expressed on the unreliability of some of the entries therein being on many occasions entered in a slip-shod manner. Finally the change of classification from "A" to "D" was done by the investigating Officer and not by Bashir who recorded the statement.

It was also contended by Mr. Manjeet Singh that Bashir was not a truthful witness because subsequently in cross-examination he admitted that he had not only taken one statement but five statements. Even asssuming that Bashir was lying on this point which is not in any case a material point in the issue, it would be wrong to say that because of this one lie the whole of his evidence must be rejected *in toto* – see *Khoon Chye Hin* v. *Public Prosecutor*.[21]

Therefore I do not consider all these grounds provided by Mr. Manjeet Singh sufficient basis for me to alter my finding on the voluntariness of (P101).

(b) *The law of Section 34 of Penal Code and Section 30 of Evidence Act*

In the consideration of the role of the confession of Rahmat Satiman in proving the charge against all the accused, the law of Section 34 of the Penal Code and Section 30 of the Evidence Act are relevant.

Under Section 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct or other relevant circumstances of the case. See *Mahbub Shah* v. *King Emperor*.[22] The doctrine of common intention is as expressed in section 34 of the Penal Code itself which reads –

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone".

It is also a common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended

death. Every one must be taken to have intended the probable and natural results of the combination of acts in which he joined.

Thus it is clear that the leading feature of section 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfill the requirements of Section 34. First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is logical because how can there be participation without physical presence? Even passive participation may require physical presence.

I find no difficulty in holding the voluntariness and truth of P101. But what is the effect against the other accused? For the role of the confession as against the other accused persons Section 30 of the Evidence Act is relevant which reads as follows:

"When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself and some other of those persons is proved, the court *may take into consideration* the confession as against the other person as well as against the person who makes the confession".

It is clear from a long line of authorities that a confession of a co-accused is *only an element* in the consideration of other evidence which evidence must be sufficient to support a conviction. In *Gunadhar Das* v. *State*[23] it was stated similarly:

"In short the conviction must be based on the other evidence. The confession can only be used to help to satisfy a court that the other evidence is true".

H.T Ong C.J. in *Herchun Singh*[24] clarified the position clearly at page 210 where he said:

"In our judgment, however, the proper interpretation of section 30 is that of Bose J. in *Kashmira Singh*, as follows:

"The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether 'if it is believed', a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, 'if believed', it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept".

The principle in *Herchun Singh* was reiterated by the same learned Chief Justice in another Federal Court case of *Yap Chai Chai & Anor.* v. *Public Prosecutor.*[25] Stated simply the principle is as follows. It would be proper for the trial judge to take the confession of one accused into consideration against the other accused to lend assurance to other evidence the other co-accused. In my view the operative words on the judgment in *Kashmira Singh* are the words "to lend assurance" which means that there must be other positive evidence against a co-accused before the confession of an accused can be called in aid to lend assurance to it. This principle is carried in many Indian decisions and I think it is a logical principle. If (P101) is to be permitted in law to be used against other persons without any more positive evidence against such persons, then not only should the four accused be in the dock now but also Abdullah Ambik (PW30) and Ma'dan who according to (P101) were at the scene of the crime and participated in the execution of the pre-arranged plan.

As to why the law is strict on the application of a confession of an accused person as against a co-accused is not difficult to appreciate because it is based on a very sound principle. Since a confession is neither required to be given on oath nor to be made in the presence of the other co-accused whom it implicates it is therefore not wrong to describe it as a very weak type of evidence which should not be allowed to form the basis or foundation of a conviction but should only be used in support of other positive evidence. This, in my opinion, is the intention of section 30 of the Evidence Act when it used the words "may take into consideration".

I am merely echoing the view of the Privy Council in *Bhuboni Sahu* v. *R.*[26] Sir John Beaumont observed that "a confession of a co-accused is obviously evidence of a very weak type ... The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence."

The result is therefore that in dealing with the confession of Rahmat Satiman as against the other accused the court should not start with the confession but should begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of

the evidence then it is permissible to turn to the confession in order to receive assurance as to the conclusion of guilt of the co-accused.

Let me now deal with the evidence against the co-accused. First, with regard to Nordin bin Johan, the second accused and Aziz Abdullah, the fourth accused. Apart from the confession of Rahmat Satiman the only evidence which purports to connect them with the death of Dato Taha was that they were seen and identified by Atun (PW18) at about midnight on April 13, 1982 together with three others, namely Dato Mokhtar, Aziz Tumpuk and Abdullah Ambik. Abdullah Ambik turned hostile to the prosecution and Aziz Tumpuk is dead. They were seen near a white car in Gan Kee Estate, 3½ miles away from the scene of the crime and about 1½ hours before the time of the murder. In a somewhat similar situation Matthew C.J. said in the judgment of the Court of Appeal in *Yusoff & Anor.* v. *Public Prosecutor.*[27]

"Quite apart from this, even accepting the confession of the 2nd appellant as being both voluntary and true, there is the question whether the confession was sufficient to establish the guilt of the 1st appellant. Section 30 of the Evidence Ordinance reads:

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court *may take into consideration* such confession as against such other person as well as against the person who makes such confession."

The effect of the words "may take into consideration" is well set out in *Woodroffe & Ameer Ali's* Law of Evidence, 9th edition, at pp. 312 & 313, as follows: –

"These words do not mean that the confession is to have the force of sworn evidence, but such a confession is nevertheless evidence in the sense that it is matter which the court, before whom it is made, may take into consideration in order to determine whether the issue of guilt is proved or not. The wording, however, of this section (which is an exception) shows that such a confession is merely to be an element in the consideration of all the facts of the case; while allowing it to be so considered, it does not do away with the necessity of other evidence."

The other evidence is of little, if of any, value and merely shows that the two appellants were seen together about midnight on the September 19/20, 1955. In fact, the convictions rest entirely on the confession of the 2nd appellant which we have already pointed out is wrong."

Thus, apart from the identification of Aziz Abdullah by PW18 in Gan Kee Estate that night there is absolutely no other evidence against him except what is stated in the confession of Rahmat Satiman.

As regards Nordin Johan there are of course other evidence namely the examination of his white Mercedes car registration No. WN76 by PW9 (the chemist) which, however, bore negative results. According to the chemist, there was no evidence of tampering of the number plates. Then there was also evidence of his visit to the Dy. CPO Negri Sembilan (PW28) to inform the latter of the probable identity of the night caller to the house of the late Dato Taha on the night in question. Finally there was evidence of his visit to the funeral (without his beard!). All these in my opinion have no real probative value to the charge and even taken as a whole do not take the prosecution anywhere for the purpose of section 34 of the Penal Code.

I admit there is a lot of suspicion cast on Nordin Johan and Aziz Abdullah. I will not conjecture how they will live out this suspicion. But in our system of administration of justice suspicion, however strong, cannot be a substitute for proof by admissible evidence.

As regards the first accused, Dato Mokhtar Hashim, the position is entirely different. With respect I disagree with Mr. Jagjit Singh on the non-probative value of the gun licence (P16). My reading of section 4(5) of the Arms Act 1960 clearly makes P16 an original document (as original at least as the register) and therefore constitutes the best evidence of its contents – see also *Ong Kim Piaw* v. *Public Prosecutor.*[28] I also disagree with the contention that the prosecution's failure to call P.C. Md. Sani as a prosecution witness is fatal to the chain of evidence with regard to the gun (P88) etc.

In my view there is no real gap at all in the prosecution chain of evidence as far as gun (P88) is concerned. The gun and the gun licence (P16) were handed by P.C. Md. Sani to Insp. Rashid (PW31) pursuant to a request by conversation between SAC Yahya (PW29) and the first accused. This is in evidence. Again when SAC Yahya later went to see the accused in his office SAC Yahya was asked by the accused if he had received the gun. There is therefore no fatal break in the chain of evidence – see also *Su Ah Ping* v. *Public Prosecutor.*[29]

Mr. Jagjit Singh also contended that letter (P17A) purporting to be from the first accused

to SAC Yahya was not proved because the signature of the first accused was not proved. I think here the contents of the letter speak for itself which refers to a telephone conversation between SAC Yahya and the first accused. Seen in the context of the other evidence it is not essential that the signature of the first accused should be formally proved. In fact the contents of the letter (P17A) also confirms that the first accused was the owner of gun (P88).

As regards Rahmat Satiman, although (P101) did not state that he fired the shots which killed the deceased, it is crystal clear that the statement fully admitted his participation. Participation does not mean merely the doing of the act confined to the specific commission of the crime. Thus it is true that Rahmat Satiman did not fire the shots nor did he take part in binding the hands and eyes of the deceased before the shooting but it was Rahmat Satiman who had prepared the incense into five parts supposedly to weaken the deceased and had them strewn and burnt all around the compound of the deceased's house as instructed to him by the bomoh in Johor Bahru; and all these acts, I regard, were part and parcel of the planning and execution of the crime.

To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a *prima facie* case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of section 302 read with section 34 of the Penal Code? My answer to the question is in the negative.

Again, does the totality of the evidence against the second accused and the fourth accused excluding the confession (P101) lead the court to the irresistible inference that they were present at the scene of the crime and participated in the commission of the offence? I am afraid I am unable to honestly give an affirmative answer to this question. It has been said again and again by the highest judicial authorities that the onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that the evidence must point irresistibly to the conclusion of the guilt of the accused.

Following the guideline by Lord Diplock in *Haw Tua Tau* v. *Public Prosecutor*.[30] on what is meant by the words "if unrebutted" it is my view that a *prima facie* case has been made out against Dato Mokhtar Hashim, the first accused and Rahmat Satiman, the third accused.

My order therefore is as follows:

(1) Second accused and fourth accused are hereby acquitted and discharged;

(2) First accused and third accused are called upon to enter their defence.

The appellants appealed to the Federal Court.

FEDERAL COURT.

Jagjit Singh (*Abdul Mutalib* and *Abu Zahar Ujang* with him) for the first appellant.

Manjeet Singh Dhillon (*Lawrence Perera* with him)

Tan Sri Abu Talib bin Othman, Public Prosecutor (*T.S. Sambanthamurthi* Deputy Public Prosecutor with him) for the respondent.

Cur. Adv. Vult.

Abdoolcader F.J. (delivering the Judgment of the Court): The tragic events that transpired in the early hours of the morning of April 14, 1982 at Gemencheh in the State of Negeri Sembilan and the resultant death of Dato Mohd. Taha bin Talib, the former Speaker of the State Legislative Assembly, although perhaps not as startling or as dramatic as the assassination of Abraham Lincoln, generated waves in the country, culminating as they did in these proceedings, with this in turn unfolding, in the course of a trial over a span of some 76 days, a grim and gruesome tale of political intrigue, sorcery, conspiracy and murder involving a Minister of the Crown in office at the material times. The effect of all this was like a scandal in a monastery. And so a chain of events in a small town bore within it the seed of much bigger things.

The sequel to this unfortunate and deplorable occurrence was that Dato Mokhtar bin Hashim and Rahmat bin Satiman, the 1st and 2nd appellants in these consolidated appeals, Mohd. Nordin bin Johan, Aziz bin Tumpuk and Aziz bin Abdullah were jointly charged that they on April 14, 1982 at or about 1.30 a.m. at Kampong Seri Asahan, Gemencheh, in the District of Tampin, in the State of Negeri Sembilan, in furtherance of their common intention, did commit murder by causing the death of Dato Taha ('the deceased'),

and that they had thereby committed an offence punishable under section 302 read with section 34 of the Penal Code.

The case was classified as a security case under the Essential (Security Cases) Regulations, 1975 ('the Regulations') by virtue of a certificate issued by the Attorney General under the provisions of regulation 2(2) thereof. Aziz bin Tumpuk died before the commencement of the trial and the case proceeded against the other four before Hashim bin Yeop Abdullah Sani, F.J., sitting in the High Court at Kuala Lumpur, and at the end of the case for prosecution, the learned Judge, applying the principle enunciated by this court in *Public Prosecutor* v. *Sihabduin bin Salleh & Anor.*[2] that the court is not obliged under the Regulations to call on an accused to enter on his defence unless the prosecution has at that stage proved a *prima facie* case against him, acquitted Mohd. Nordin bin Johan and Aziz bin Abdullah but called on the appellants for their defence, and at the conclusion of the case for the defence convicted the appellants on the charge preferred and sentenced them to death. We should perhaps mention that the Public Prosecutor appealed against the acquittal of the other two accused but we dismissed his appeal (Federal Court Criminal No. 2 of 1983) on June 9, 1983.

The appellants now appeal against their conviction and sentence. We heard these joint appeals for some eleven days and at the conclusion of argument a month ago today reserved judgment. *Et sic ad judicium* (and so to judgment). We will in the course of this judgment be referring to several authorities not cited here or in the court below but which appear to us to be pertinent to the contentions raised as the principles enunciated therein are well established and incontrovertible. We must nevertheless express our appreciation to counsel on both sides for the careful arguments presented before us.

It is not necessary to preface this judgment with the facts and recount a summary of the evidence save to say that the deceased was found dead from bullet wounds outside his house in Gemencheh in the early morning on April 14, 1982, as we will have to refer to and consider the evidence pertinent to the grounds of appeal raised before us, and now proceed to discuss the several grounds of complaint in respect of the learned Judge's judgment *in casu*.

Mr. Jagjit Singh for the 1st appellant takes as his first point the failure of the learned Judge to consider the preliminary objection he raised at the inception of the trial and renewed subsequently that this was not a security case but one of law and order, that in the circumstances the Attorney General could not and should not have issued his certificate under regulation 2(2) of the Regulations, that the trial was accordingly a nullity and that it should be remitted to the Magistrate's Court for a preliminary enquiry prior to any committal for a trial by jury in the High Court under the provisions of the Criminal Procedure Code. The point taken was however decided by this court in *Mohamed Nordin bin Johan* v. *Attorney General, Malaysia*[31] which arose out of and in connection with these very same proceedings by an application by one of the 1st appellant's co-accused. Indeed the 1st appellant himself applied on August 20 1982 by Originating Motion A28 of 1982 for leave to apply for certiorari to quash the Attorney General's certificate in this very matter and other consequential orders but leave was refused on September 1 1982. There was no appeal against that order, presumably because of the decision of this court in *Mohamed Nordin bin Johan (ante).* This attempt to re-litigate and re-open an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter* v. *Chief Constable of the West Midlands Police & Ors.*[32] which was applied by this court in *Tractors Malaysia Bhd.* v. *Charles Au Yong*[33].

A major frontal attack has been made by both appellants against the learned Judge's finding that a statement made by the 2nd appellant which amounted to a confession was voluntary. The 2nd appellant was arrested on May 29, 1982 and detained under the Internal Security Act, 1960 at Gombak Police Station for some 42 days. He was interrogated whilst under detention, according to him, by an interrogation team of eight persons headed by Inspector Badaruddin bin Isa (RW1 in the *voir dire*) although the prosecution case is that the other seven were only on guard duty. On June 23, 1982 he made the statement in question under section 112 of the Criminal Procedure Code which was recorded by DSP Mohd. Bashir bin Ali (PW8) and which amounted to a confession implicating not only himself but also his co-accused. The statement purports to narrate the planning and preparation of the murder of the

deceased giving various dates of meetings held between the participators and also gives a somewhat vivid account of the actual murder, and he said in that statement that the 1st appellant fired the fatal shots. We would pause to state that according to Dr. Harcharan Singh Ahluwalia (PW3), the consultant pathologist who performed the autopsy on the deceased, Dato Taha had three bullet wounds in the head, chest and thigh and either of the first two would have been fatal. The voluntariness of the statement was put in issue and after a *voir dire* the learned Judge held the statement to be voluntary and therefore admissible, and it was accordingly admitted in evidence and put in as P101.

The Public Prosecutor has asked us in this connection to reconsider the decision of this court in *Johnson Tan Han Seng* v. *Public Prosecutor*[1] to the effect that under regulation 21 of the Regulations the prosecution must prove that a statement made by an accused person was voluntary if they want to rely on it and submits that that regulation on its wording precludes any such burden on the prosecution. We see no reason to do so and re-affirm that that decision sets out the law correctly. Any statement made by an accused person to be admissible must be voluntary and any other construction would be tantamount to subverting a basic right of an accused and give greater stringency to the Regulations than would be warranted or justified in our system of criminal jurisprudence.

The Gombak Police Station station diaries (D105 A-E) and lock-up register (D104) for the period from May 29 to July 10 1982 were put in by the defence through Inspector Aziz bin Abdullah (DW4) in the *voir dire* and heavily relied on, and it is the entries in the station diaries that appear to play a prominent part in the attack by the defence on P101. The learned Judge dismissed the station diaries as being unreliable on the ground that the recording of the entries appeared to him to have been done in a slipshod manner and referred to two examples of what he considered to be erroneous entries. Before us the admissibility of the station diaries was made an issue and the Public Prosecutor contends that they are not public documents in that they are not available for public inspection and the entries therein were not made for public purposes but only to regulate the internal business of the police force. He contends that the station diaries are kept by virtue of administrative orders called Standing Orders made by the Inspector-General of Police under section 97 of the Police Act, 1967. Mr. Manjeet Singh for the 2nd appellant, however, relies on section 35 of the Evidence Act, 1950 which provides (so far as relevant for present purposes) that an entry in an official book or register stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty is itself a relevant fact.

There is unfortunately no evidence before us as to the Inspector-General's Standing Orders made under section 97 of the Police Act with regard to the nature and purpose of a station diary and the ambit and extent of the official duty of the person making the entries therein to determine whether section 35 of the Evidence Act indeed applies thereto. The Privy Council held in *Dirgaj Deo Bahadur* v. *Beni Mahto & Ors.*[34] that if, in the case of official documents admissible in evidence under section 35 of the Indian Evidence Act (which is *in pari materia* with ours), it could be shown that any particular part was in excess of the official duty by reason of which it came into existence, that part might not be admissible. The lock-up register however is clearly admissible under section 35 of the Evidence Act as it is a journal within rule 34(2) of the Lockup Rules, 1953, and the lock-up register produced has cross-references to entries in the station diaries; this correlation would therefore make all the relevant entries in the station diaries admissible as they would form part of the lock-up register and the two must therefore be read conjointly. When it is the duty of a public officer to make some entries in any public or other official book it is admissible in evidence to prove the truth of the facts entered as well as the fact that the entries were made by him although their authenticity be not confirmed by the usual test of truth, namely, the swearing and cross-examination of the person who prepared them. In any event all the entries were put to Inspector Aziz who confirmed them and they accordingly form part of the evidence before the learned Judge in the *voir dire*.

No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement [*Ibrahim* v. *R.*[35] per Lord Sumner)] and this test was accepted by the House of Lords as the correct approach in *Director of Public Prosecutions* v. *Ping Ling*[9] in which the House said that is not necessary before a statement is held to be inadmissible because it is not shown to have been voluntary, that it should be thought or held that there was impropriety in the conduct of the

person to whom the statement was made, and that what has to be considered is whether a statement is shown to have been voluntary rather than one brought about in one of the ways referred to. It appears from the decision in *Ping Lin (ante)* that the classic test of the admissibility of an accused's confession that the prosecution must establish beyond reasonable doubt that it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority, or by opression, should be applied in a manner which is part objective, part subjective.

In the Privy Council in *Wong Kam-Ming* v. *The Queen*[36] Lord Hailsham of St. Marylebone said (at page 261):

"... any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."

In *R.* v. *Wilson*[37] the New Zealand Court of Appeal held that confessions obtained by overbearing the will of a person in custody by tactics amounting to compulsion should not be received in evidence and that whether a case is of that kind is a question of fact and degree. The defendant in that case had been subjected to prolonged interrogation in the confinement of a small room which was unfair and oppressive and it was held that there was accordingly oppression and the means employed must be regarded as themselves involving a miscarriage of justice.

It is open to an appellate court to interfere with the finding on a question of fact as to the voluntariness of a confession if the impugned finding has been reached without applying the true and relevant legal tests and consideration of relevant matters (*Sarwan Singh* v. *State of Punjab*[38]; *Public Prosecutor* v. *Thum Soo Chye*[39]).

As we have said the learned Judge wholly discounted the entries in the station diaries on the basis of two wrong entries which have however been explained by Mr. Manjeet Singh as not in fact being erroneous. The entries in the station diaries which were in fact confirmed by the evidence of Inspector Aziz show prolonged periods of interrogation by Inspector Badaruddin and extremely odd hours of interrogation ranging into the early hours of the morning, in breach of rule 20 of the Lockup Rules. Inspector Badaruddin said in cross-examination as to the latter that he did that because he felt like interviewing the 2nd appellant at that time and that it was the right time to do so but that whenever the 2nd appellant said he did not want to be questioned this request was acceded to and the appellant would be allowed to sleep if he so requested. We think this explanation must be looked at askance and with considerable circumspection as there would hardly be any point in taking a man out for questioning and then abandoning the exercise by acceding to his request. If that was indeed the case, it would perhaps have been more feasible and just as plausible and would have saved a lot of time and trouble, not to mention disappointment to Inspector Badaruddin and obtrusion on the poor man's slumber, to have sent him an invitation to attend for interrogation with a 'r.s.v.p.' through bearer. We must stress that what is involved in all this was the systematic interrogation of a detainee, not overtures for friendly poker sessions. On Inspector Badaruddin's evidence, it would seem the 2nd appellant apparently spent the better part of his sojourn in the Gombak Police Station in its conference room and all that he did almost all the time was to eat, sleep and pray as and when he pleased – and all this at government expense too!

As to the long hours and odd hours of interrogation stated in the station diaries this would appear to be suggestive of oppression within the definition thereof by Sachs, J., in *R.* v. *Priestley*[40] which was adopted in *R.* v. *Prager*[41]. We are told by the Public Prosecutor that this might be the method adopted by the Special Branch, but if we are to approbate and endorse the whims and fancies of interrogators in the systems they choose to utilise, we might as well countenance an interrogator's preference to stand a man on his head or hang him up by his toe-nails whilst questioning him so as the better to enhance the flow of blood to his cerebral cavity and stimulate his poetic faculties and recollection of past and recent events. We need hardly remind those involved in the interrogation of witnesses and accused persons that any methods adopted in the process outside accepted norms and standards must be able to withstand the test of strict curial scrutiny.

Inspector Badaruddin testified that he did not interrogate the 2nd appellant for more than an hour at a time but against this there is an entry in the station diary on June 3, 1982 relating to intensive interrogation ('soal desak'). Inspector Badaruddin also said that the 2nd appellant was allowed to pray whenever he wanted to but the 2nd appellant's denial as to this appears to be confirmed by a specific entry in the station diary on June 10, 1982 giving permission for him to pray which would be quite unnecessary if in fact there was no restriction in this regard. The suggestion of the prosecution is that these entries are erroneous, but there is no evidence to this effect and they are there and should have been considered by the learned Judge who wholly disregarded them. Inspector Badaruddin and his seven-man team of guards or interrogators, whichever they might have been (but we should point out that the 2nd appellant was able in his evidence to identify each one of them and say what part they played), did not produce their diaries. This again would lay their evidence open to adverse criticism to the extent of diminishing its value (*Zahiruddin* v. *Emperor*[42]).

The 2nd appellant in his evidence mentioned three specific inducements held out to him. First, that he gave in to the pressure because he was told that any statements made by him would not be used against him in court and he could make another statement later on. Another statement (D102) was in fact taken from him on July 9, 1982 by another police officer, DSP Mohd. Fauzi Shaari, in which the 2nd appellant gave an alibi as to his whereabouts on April 13 and 14, 1982 and which he said was the truth. Second, he said he was told that if he co-operated he would become a witness for the Government. The alteration at the top of P101 confirms the change of designation of his statement from that of a witness to one by an accused person according to the practice of classification of statements confirmed by the evidence of DSP Bashir and SAC Yahya bin Yeop Ishak (DW2 in the *voir dire* – PW29 in the main trial). Third, he said he was told he would be given a better job. Again the 2nd appellant's signatures at the end of each page in P101 varied from page to page even to the naked eye, as DSP Bashir himself conceded under cross-examination. The station diaries also disclose that Inspector Badaruddin saw the 2nd appellant before P101 and D102 were recorded by DSP Bashir and DSP Mohd. Fauzi respectively which again might perhaps tend to suggest the continuing influence of the interrogating officer in making his presence felt.

The evidence disclosed that the 2nd appellant made a statement to Inspector Badaruddin on June 4, 1982 revealing a plot involving the 1st appellant and this was communicated to SAC Yahya who saw him on June 7 when it was said the 2nd appellant repeated the allegations to him. This statement was tape-recorded on June 10 and a formal statement (P101) was recorded from him in writing on June 23 by DSP Bashir. According to the learned Judge the statement made on all these dates were the same but SAC Yahya in his evidence under cross-examination said specifically that the information the 2nd appellant gave on June 4 did not relate to the offence under section 302 of the Penal Code. SAC Yahya also paid in his evidence that on June 7 at about 8.30 a.m. Inspector Badaruddin told him that the 2nd appellant was ready to narrate and when he met the latter at 3.00 p.m. that day the 2nd appellant was still being interrogated and he was told that the 2nd appellant was ready to speak and was ready to give a statement, and Mr. Manjeet Singh says the word 'ready' used three times tends to suggest anticipatory preparation negating a voluntary element in what occurred as a sequence. SAC Yahya testified he then listened to what the 2nd appellant had to say for three hours but did not reduce this into writing nor cause his statement to be recorded then and Inspector Badaruddin continued his interrogation from June 7 until 22. Again if P101 which was recorded on June 23 clinched the matter in enabling the 2nd appellant to make a clean breast of things there was no need for DSP Mohd. Fauzi to record the second statement (D102) in which the 2nd appellant wholly resiled from what he had stated previously and gave an alibi.

The learned Judge gave no consideration to the several matters we have referred to and he appears to have dealt in considering the admissibility of P101 with the specific allegations of the 2nd appellant with regard to deprivation of food and drinks, the manner in which he was allowed to be dressed, the matter of his being prevented from performing his prayers, his complaint of deprivation of sleep and that prior to the recording of P101 he was subjected generally to inhuman treatment, and came to his several conclusions on these matters by assessing the evidence in relation thereto. It would appear that in doing this the learned Judge adopted an approach that was incorrect in that he seemed to virtually reverse the burden of proof and cast it on the 2nd appellant to rebut the evidence for the prosecution instead of dealing with the matter as one for the prosecu-

tion to establish beyond reasonable doubt that P101 was voluntary. In the circumstances we have adumbrated we do not think that the prosecution has discharged the burden incumbent on it in law. It would on the evidence and the facts and circumstances we have touched on and in the light of the authorities be wholly unsafe to treat P101 as voluntary and we accordingly hold that it should not have been admitted as evidence. It is pertinent in this connection to bear in mind the *dictum* of Cave, J., in *R.* v. *Thompson*[43] which was cited with approval by Lawton, L.J., in *Reg.* v. *Pattinson and Laws.*[44]

The entire case against the 2nd appellant rests on his statement (P101) and nothing else and apart therefrom there is no other evidence against him. His defence should not therefore have been called as there was no case against him. We accordingly allow his appeal, set aside his conviction and sentence and acquit and discharge him.

We next turn to consider the case against the 1st appellant now that P101 is no longer in evidence. The case against him is of course circumstantial, and in relation to the death of the deceased on the evidence of Sudin bin Shariff (PW22) and Datin Norsiah binti Osman (PW23), the deceased's father-in-law and widow respectively, as to the deceased being lured out of his house and hearing gunshots at the relevant time, the testimony of the pathologist of identification of the deceased's body, that of Liah binti Nahu (PW25) of seeing a white car with two figures alighting and then hearing two shots and the car speeding off in the direction of the main road, the discovery of the deceased's body and the finding of the two bullet casings (P4 and P5) by Bahadon bin Baharom, the O.C.P.D. Tampin (PW17), rests primarily on the evidence of Atun bin Ali (PW18) that he saw the 1st appellant in the company of four others in Gan Kee Estate some three and a half miles away from the scene of the crime about an hour and a half before the commission of the offence, the evidence of the pathologist who performed the autopsy and recovered two bullets (P18 and P19), the evidence of Gee Hock Eng (PW9), the firearms identification expert for the prosecution together with the evidence of the police officers who collected and test-fired several .32 pistols and revolvers, and the evidence as to the .32 Walther semi-automatic pistol P88) which was alleged to belong to and to have been in the possession, custody and control of the 1st appellant at the relevant time based on the pistol licence (P16), the letter written by the 1st appellant to SAC Yahya (P17A), a statement (P119) made by the 1st appellant to DSP Bashir on June 14, 1982 under section 112 of the Criminal Procedure Code and the evidence of SAC Yahya and Inspector Rashid bin Abdul Lajis (PW31).

Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman and Ors.* v. *Public Prosecutor*[45]).

We now turn to the evidence adduced by the prosecution to consider whether this test is satisfied in the case against the 1st appellant.

First, the evidence of Atun in relation to the 1st appellant we have referred to. His evidence was accepted by the learned Judge who found him to be a consistent witness unshaken by very severe cross-examination, and we can find no reason to interfere with his assessment. The credibility of a witness is primarily a matter for the trial Judge. There is a homogeneous concatenation of authority on this principle and we refer to the *locus classicus* on this aspect in a passage in the judgment of Lord Thankerton in *Watt or Thomas* v. *Thomas*[46]. The Privy Council said in *Caldeira* v. *Gray*[47] that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. We feel that the following passage (at page 138) from the judgment of the Board in that case delivered by Lord Alness bears citation *in extenso:*

"The appellant is exercising a right of appeal which is his by right, and their Lordships recognise that they cannot merely because the question is one of fact, and because it has been decided in one way by the learned Trial Judge abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. Nonetheless, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope.

This is familiar law. It has received many illustrations – and, in particular in the House of Lords –, the most recent

of these being the case of *Powell and Wife* v. *Streatham Manor Nursing Home*, [1935] A.C. 243; 104 L.J. K. B 304; 152 L.T. 563; 79 S.J. 179; 51 T.L.R. 289. In that case it was held that

> "Where the Judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be: and the appellate tribunal will generally defer to the conclusion which the Trial Judge has formed.'
>
> Lord Wright, in the course of his speech, said:
>
> 'Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a Trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'."

Mr. Jagjit Singh complains that there was also a denial of justice when the learned Judge refused an application to impeach the credit of Atun under section 155(c) of the Evidence Act by the production of the statement or statements he had made to the police. This application was made on the basis of a 'hunch' of counsel that Atun had in his oral evidence departed from his statement or statements to the police, relying on the decision of this court in *Husdi* v. *Public Prosecutor*[12] A 'hunch' is a presentiment, a mental impression or feeling, a vague expectation or foreboding, and we would like to make it abundantly clear that the 'hunch' referred to in *Husdi (ante)* certainly could not have been intended to operate without some secure basis or foundation in order to activate the provisions of sections 145 and 155(c) of the Evidence Act, and for this purpose sheer innate intuition of counsel will not suffice. A mere hunch *per se* for this purpose is *nihil ad rem;* it must be secured on a substratum of some basis or foundation. There must as a *sine qua non* be some material contradiction or other circumstances unexplained by the witness in the first instance before counsel can move to seek to impeach his credit, and in the case of Atun the learned Judge accepted his explanation as to the reason for the delay in intimating to Bahadon, the O.C.P.D. Tampin, what he saw in Gan Kee Estate on the night in question. Mr. Jagjit Singh however submits that the examination by Gee, who is also a government chemist, of Mohd. Nordin bin Johan's car for blood stains, bullet holes, human hair, soil and tampering of number plates must have been as a result of information supplied by Atun to the police but we cannot agree that this provides any sufficient basis for any such 'hunch', as Gee's examination would not necessarily be the result of what Atun told the O.C.P.D. Tampin, but could well have been a routine examination in the course of police investigation. We accordingly hold that the learned Judge was right in rejecting the application to impeach Atun as there was no basis therefore.

Another witness whose testimony we have to consider is Abdullah bin Ambik (PW30). He was called by the prosecution and apparently intended to be a Crown witness in the case but turned hostile and completely resiled from the statement he made to the police on June 21, 1982 under section 112 of the Criminal Procedure Code which was put in as P120. An application was made by the Public Prosecutor to impeach his credit under section 155(c) of the Evidence Act, and the relevant passages in his statement were put to him which were wholly different from his evidence in court. He admitted making the statement but denied its contents which he said he was forced to state under pressure by the interrogating officer. At the conclusion of examination-in-chief by the Public Prosecutor the learned Judge refused to allow cross-examination of this witness by counsel and said that he found serious and material contradictions between the evidence and the statement of this witness to the police and immediately made an order impeaching his credit. The order made by the learned Judge impeaching this witness's credit and denying the right to counsel for all the accused to cross-examine him was clearly wrong.

When a witness's credit is sought to be impugned under the provisions of sections 145 and 155(c) of the Evidence Act his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence, as the case may be. No immediate order of a summary nature can or should be made as was done in this case and the right of cross-examination or re-examination according to the circumstances should not be denied as it may well be that on the exercise of such right his credit might be repaired, restored or re-established (*Paramasivam* v. *Public Prosecutor*[48]; *Sat Paul* v. *Delhi Administration*[49]). This is all the more pertinent in the present instance as Abdullah Ambik had himself raised the issue of the voluntariness of the statement he made to the police and it cannot be a matter of speculation as to what the effect of cross-examination might well have been. To say therefore that cross-examination would have been a waste of time is not a proposition we can in any

way consider acceptable or entertain. We are unable to say what cross-examination would have elicited and what different light it could or might have thrown on the situation, and in this connection consider as pertinent this passage from the judgment of Megarry, J., in *John* v. *Rees*(50):

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

Abdoolcader, J., took the correct approach in *Public Prosecutor* v. *Datuk Haji Harun bin Haji Idris & Ors.*(51) when he refused an application to make an immediate order impeaching the credit of a witness whose evidence contradicted his statement to the police but went on to consider his evidence as a whole at the close of the case for the prosecution and then discounted it as discredited and wholly disregarded it in the circumstances. The procedure for impeachment should be on the lines set out in *Muthusamy* v. *Public Prosecutor*(15) but we must stress that the evidence of such a witness must be considered as a whole with the rest of the evidence at the appropriate stage and that any practice which might have developed, as we are told, in the lower courts of making an immediate order of impeachment once a material discrepancy is discovered and no explanation is either offered or accepted, is wholly wrong and should cease immediately. We need only observe in reiterating the absolute fallacy of any such wholly unwarranted practice that a testifying witness cannot be dealt with and struck out or struck off *ex tempore* and in midstream at an intermediate stage of the proceedings as if he were a defective writ or pleading.

We will therefore in this case have to determine the effect of the improper way the evidence of Abdullah Ambik was dealt with after a consideration of all the other evidence against the 1st appellant.

As to the ownership of the pistol (P88) by the 1st appellant the prosecution relies on the evidence of SAC Yahya and Inspector Rashid and P16 which is the pistol licence and P17A which is a letter written by the 1st appellant to SAC Yahya. Mr. Jagjit Singh however contends that the handwritten contents of P16 are hearsay and that although the licence itself is primary evidence it does not reflect the truth of its contents, and relies on the decision of the House of Lords in *Myers* v. *Director of Public Prosecutions*(52) and related cases. As to that we would say that in *Myers (ante)* the microfilm records were the only evidence, and in some cases the presumption of regularity will permit the admission of a document without proof of its authenticity and reliance can also be had on the circumstances surrounding its genesis (*Pamplin* v. *Gorman*(53)).

The licence (P16) was issued pursuant to the provisions of sections 3 and 4 of the Arms Act, 1960 in the form prescribed by the Arms Licensing Regulations, 1961, and section 4(5) of the Act clearly makes the licence an original document, the particulars whereof are entered in a register kept by the Chief Police Officer of a State. It bears the 1st appellant's photograph and identity card number which tallies with that appearing in his statement to the police (P119) and also contains the serial number of the pistol which is that of P88. The pistol (P88) together with the magazine with five live bullets (P15), the licence (P16) and a clutch bag (P14) were handed by P.C. Mohd. Sani bin Mohd. Shariff (called by the defence as DW27), the 1st appellant's police bodyguard, together with P17A to Inspector Rashid pursuant to a request by SAC Yahya in a telephone conversation with the 1st appellant, and SAC Yahya was asked by the 1st appellant if he had received the pistol when he went to see the latter in his office subsequently. All this is borne out by the evidence adduced and the disposition and custody of these exhibits until their production in court were properly accounted for and there was accordingly no break in the chain of evidence (*Su Ah Ping* v. *Public Prosecutor*(29)), and the fact that P.C. Sani was not called by the prosecution to testify on this aspect did not constitute any break in the chain. On the evidence P16 was the 1st appellant's licence and no proof of its contents was necessary.

It is also contended on behalf of the 1st appellant that P17A is documentary hearsay and that the handwriting and signature therein must be proved to be that of the 1st appellant. The signature or handwriting in a document may be proved by circumstantial evidence if that irresistibly leads to the inference that the person in question must have signed or written it (*Baru Ram* v. *Prasanni*(54)) and a document can also be regarded as evidenced by its contents and the internal evidence afforded by the contents can be accepted as authentication as when it states facts and circumstances which

could have been known only to the person to whom the authorship is attributed. The execution or authorship of a document is a question of fact and may be proved like any other fact by direct as well as circumstantial evidence which must be of sufficient strength to carry conviction (*Krishnabiharilal* v. *State*(55)). Having regard to the contents of P17A and the letterhead of the Ministry whose portfolio the 1st appellant was then holding as Minister, the evidence of SAC Yahya and Inspector Rashid which confirmed the receipt of the pistol and the licence and the enquiry by the 1st appellant of SAC Yahya as to whether he had received the pistol sent through P.C. Sani together with the ammunition and P17A, the irresistible conclusion is that the handwriting and signature in P17A is that of the 1st appellant and that he wrote that letter.

There is accordingly in the circumstances we have discussed no gap regarding the handing over by and taking possession of the pistol (P88) from the 1st appellant and the evidence clearly evinces that this was the pistol he owned and the fact that the prosecution did not call P.C. Sani did not affect the position or create any gap in the chain of evidence.

On the question of the 1st appellant's possession, custody and control of P88, we have the evidence of SAC Yahya, the statement by the 1st appellant to the police (P119) and the evidence of DSP Bashir who recorded it. The voluntariness of P119 was not challenged and a perusal of that statement shows that the 1st appellant knew which pistol he was talking about. On a careful and considered scrutiny of this evidence we are of the view that the prosecution has established that the 1st appellant was in possession, custody and control of P88 at the material time specified in the charge and that the learned Judge was correct in coming to that conclusion.

We now advert to the evidence of Gee who testified as a firearms identification expert for the prosecution. The evidence discloses that several .32 pistols and revolvers were test-fired by the police and the expended bullets and casings sent to Gee for examination. The errors by the police in the collection and labelling of the test-fired bullets were explained and accounted for in the evidence. Amongst these was P88 and the expended bullets and casings from it were examined by Gee who as a result came to the conclusion that the two bullets taken from the body of the deceased (P18 and P19) and the bullet casings (P4 and P5) had been fired from P88.

Mr. Jagjit Singh strenuously contends that the learned Judge was wrong in accepting Gee as an expert in firearms identification and questions his qualifications, background, working experience, training and experience in court. The competency of an expert is a preliminary question and is one upon which, in practice, considerable laxity prevails. In *Caldeira* v. *Gray*(47) the Privy Council said that in assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the trial Judge – e.g. whether they confined themselves to giving evidence, or acted as advocates – may powerfully and properly influence the mind of the Judge who sees and hears them in deciding between them and that these advantages, which are available to the trial judge, are denied to an appellate court. In *Joyce* v. *Yeomans*(56), the English Court of Appeal held that in the case of evidence given by experts, the trial Judge, who had observed the demeanour of the witnesses, was in a significantly better position than an appellate court to assess the value of the evidence given, and accordingly the appellate court should be slow to interfere with the Judge's findings.

Gee testified that he had done 62 cases of firearms identification which formed the main part of his work over the last six years and that he had given evidence on three occasions in the Sessions and Magistrate's courts thereon, and had apart from a degree in chemistry practical training in this field. One can acquire expert knowledge in a particular sphere through repeated contact with it in the course of one's work, notwithstanding that the expertise is derived from experience and not from formal training (*R.* v. *Murphy*(57)). The learned Judge who saw and heard Gee accepted him as an expert after a considered assessment of his evidence and we see no reason or justification whatsoever to dissent from his conclusion. Mr. Jagjit Singh complains that Gee has never given evidence in the High Court but we can see no rule requiring this as a prerequisite to accepting him as an expert. He has given evidence, as he said, in the lower courts and even if he had not that would not debar him from being accepted as an expert if he could satisfy the court as to his standing, as there is always a first time for everything. Previous testification in court as an expert witness is no doubt an added consideration but not necessarily the primary consideration for an otherwise qualified person. The learned Judge has analysed his evidence in some detail, and on a diligent perpension of his evidence through all the three stages of

examination we are of the view that the criticisms levelled by counsel do not detract from the validity of the conclusion as to Gee's evidence which the learned Judge came to. Much was made of the fact that the test-firing was done into cotton waste or blankets but the learned Judge did not find this an unacceptable method, and we agree as there is literature on the subject to this effect.

We now come to the complaint of what counsel puts forward as a material discrepancy between the evidence of Gee and the pathologist. The pathologist who performed the autopsy said he found one bullet (P18) in the head of the deceased which he described as dented, splintered and shattered. Under cross-examination he said that the X-ray he had taken showed the splinter which was lying in the head. Gee however said that this bullet was dented. We think there was an unfortunate choice of words by the pathologist which taken separately would contradict each other as a bullet could not be shattered and yet be at the same time merely splintered. The point however is whether the bullet extracted from the head by the pathologist was the same bullet that Gee examined. ASP Khew Ching Hoi (PW2), the investigating officer in the case, and Raja Abdul Aziz (PW5), the officer in charge of the Forensic Department of the General Hospital, Seremban, were present at the autopsy. The pathologist handed P18 and the bullet recovered from the folds of the deceased's sarong (P19) to Raja Aziz who put them in a bottle and labelled them. They were subsequently handed to ASP Khew and sent to Gee for examination after which they were returned to ASP Khew. The evidence of the pathologist was corroborated by Raja Aziz and also by ASP Khew and there is also the evidence of Inspector Yahya bin Haji Hussein (PW10) who sent the exhibits to Gee. This was confirmed by Gee who said that on July 3, 1982 he returned all the exhibits to ASP Khew. The chain of evidence with regard to the recovery of the bullets right up to their subsequent production in court during the trial was complete and there can therefore be no doubt that P18 and P19 were the same ones examined by Gee.

We should perhaps deal briefly with P19 which was recovered from the folds of the deceased's sarong. The pathologist at first took this to have come from the thigh of the deceased and has explained his mistake in taking it in the first instance as having come from the thigh. He said that he had asked Raja Aziz to mark P19 as having come from the thigh because he had been exploring the thigh and in the process he turned the body and found the bullet, blood-stained and intact, but on re-examination he found it was not from the thigh and that it was from the chest. This explanation is substantiated by the evidence of ASP Khew who was present during the autopsy and testified that the slug from the chest was removed without any instrument and it fell off the body when it was turned into the folds of the clothing. The pathologist stated in evidence that the bullet he found embedded in the thigh was not removed as it would have meant mutilation and amputation of the thigh. In the light of the chain of evidence we have referred to we cannot accept Mr. Jagjit Singh's contention that the failure of the pathologist to take a second X-ray after the autopsy has affected the identity of P19.

Mr. Jagjit Singh also submits that as there were entry and exit holes in the shirt of the deceased and as no bullet was found at the scene of the crime, then the probability would be that the bullet in the chest had in fact gone right through if the deceased had been standing when shot and that he could not have been shot while lying on the ground as the bullet was found in the folds of the sarong. These theories smack of sophistry in the teeth of the evidence as to the recovery of the bullets which we have referred to, and must be considered in the light of the fact that the exit of a bullet would depend on its velocity and the resistance to its progress in the course of propulsion.

Where a firearms expert has made the necessary tests and there is no reason for distrusting his opinion, which in fact in this case the court has accepted, there can be no room for thinking in the circumstances established that any one else other than the accused might have shot the deceased (*Kalua* v. *The State of Uttar Pradesh*[58]). In the premises and in the light of the evidence adduced by the prosecution that P88 from which the fatal shots were fired belonged to and was in the possession, custody and control of the 1st appellant at the material time, the facts proved at the close of the prosecution case point to one and only one conclusion, that it was the 1st appellant who fired the fatal shots that killed the deceased. The learned Judge therefore correctly concluded that the prosecution had established a case against him requiring him to enter upon his defence.

There is however the matter of the immediate order of impeachment of Abdullah Ambik and the denial of cross-examination of this witness by counsel which we have held to be wrong, but in

view of the overall strength of the other evidence against the 1st appellant to sustain the charge against him at this stage, we are satisfied that no substantial miscarriage of justice was occasioned on this count and we accordingly apply the proviso to section 60(1) of the Courts of Judicature Act, 1964. We should perhaps observe in the matter of the application of the proviso that the Privy Council in *Anderson* v. *R.*[59] has now authoritatively pronounced on the proper use of the proviso in murder charges when it said that it cannot be the case that the proviso is never applied in murder cases but in cases of murder great care must be taken to see that there has been no miscarriage of justice. *Anderson (ante)* was followed and applied by the New Zealand Court of Appeal in *R.* v. *McKewen (No. 2)*[60].

We now proceed to consider the defence of the 1st appellant which is primarily one of alibi but he also sought to explain the question of his possession, custody and control of P88 and the statement he made to the police (P119).

Before we turn to the defence we should perhaps consider and dispose of the question as to whether there is any burden on an accused person when he raises the defence of alibi. The learned Judge in considering the defence of alibi appears to have decided the question on a balance of probabilities, thus throwing a probative but somewhat lighter burden on the 1st appellant. It is contended before us that this was a wrong approach as all that an accused person need do is to cast a reasonable doubt and that he does not in putting forward an alibi as an answer to a charge assume any burden of proving that answer, and we have been referred to English cases to this effect in support of this submission. The position here however would appear to be different in view of the provisions of section 402A of the Criminal Procedure Code with regard to notice to be given of a defence of alibi which was added by way of amendment to the Code with effect from January 10, 1976. The concluding words of section 402A(2) 'for the purpose of establishing his alibi' are significant and would seemingly put a probative burden on an accused. The position in England would appear to turn on the specific provisions of section 11 of the Criminal Justice Act, 1967 and we would refer in particular to the provisions of sub-section (1) and the definition of 'evidence in support of an alibi' in sub-section (8) thereof. The Supreme Court of India held in *Gurcharan Singh & Anor.* v. *State of Punjab*[61] that the burden of proving an alibi undoubtedly lies on the accused setting up the defence but even so, the burden of proof as to the guilt of the accused always remains on the prosecution irrespective of whether or not the accused has made out a plausible defence. In *Public Prosecutor* v. *Chidambaram & Anor.*[62] it was held that alibi evidence should be scrutinised very carefully, for it is easy to set up an alibi and not always easy to prove it, and it must be definitely proved in order to suffice for the rebuttal of a case made out by the prosecution.

The defence of the 1st appellant rests primarily and substantially on that of alibi and he called a large number of witnesses who testified that at or about the time stated in the charge he was in his house in Tampin. On the number of witnesses called to support the defence of alibi, we pause to observe *'testes ponderantur, non numerantur'* (witnesses are weighed, not numbered or counted), that is, in case of a conflict of evidence, the truth is to be sought by weighing the credibility of the respective witnesses, not by the mere numerical preponderance on one side or the other – a principle ossified and reflected in the provisions of section 134 of the Evidence Act. The learned Judge considered the evidence adduced in some detail and on his assessment and for the reasons he gave held that this defence was unsubstantiated. This is essentially a question of fact and turns primarily on the credibility of witnesses and we have earlier referred to the principles in relation to the functions of an appellate court in this regard.

Mr. Jagjit Singh has attacked several aspects of the learned Judge's assessment of the alibi evidence but this was more or less an exercise in delving into *minutiae.* In considering whether a defence of alibi has been established the learned Judge is not limited to the evidence as to alibi but must consider all the other evidence as well. The learned Judge has given his reasons in considering the evidence of the alibi witnesses and stated that right through their testimony there were fixed and emphatic assertions of exact times of arrival and departure where these were vital to establish the alibi and he regarded this as contrary to ordinary human conduct in relation to memory of events long gone. To distil and paraphrase the essence of his judgment in summary on this aspect, the learned Judge appears to have greeted with scepticism their evidence on the common ground of their remarkable but questionable and therefore suspect collective recollection of times material to the alibi put forward and in effect expressed cynicism on their role as assiduous time-gazers in the fashion of the dedicated office clock-watcher who

at times appeared perhaps in days gone by to be a conventional epiphenomenon of some sedentary jobs. We must bear in mind that he had the benefit and advantage of seeing and hearing these witnesses but as an appellate court we only have before us their testimony in cold print. The Privy Council had occasion to observe in *Cooper* v. *Bockett*(63) 'how very difficult it is for any man, of whatever rank or class (not gifted with uncommon faculties of mind,) to remember with precision and clearness the exact particulars and order of a set of circumstances not involving his own feelings and interests, at a distance of some months from their occurrence'.

Mr. Jagjit Singh contends that the evidence of Batumalai (DW10) has destroyed the whole basis of the prosecution case in that he testified that the deceased was in the UMNO office at Gemencheh at 11.30 p.m. on April 13, 1982 but the learned Judge did not touch on or deal with this part of his evidence. He says this evidence was corroborated by Mohd. Nor bin Isa (PW21) who said that he met the deceased at about 12.00 midnight on April 13, at the UMNO office in Gemencheh and that the deceased left that place after 12.30 a.m. It is submitted that in the face of this evidence there was no reason for the 1st appellant to be waiting in Gan Kee Estate at about 12.00 midnight on April 13 and that Atun's evidence has accordingly been demolished. We see no substance in this point in the light of the other evidence and the absence of any evidence as to whether the 1st appellant knew where the deceased was at the time in question. In any event even without Atun's testimony there is sufficient other evidence against the 1st appellant.

The mainstay of the alibi evidence for the 1st appellant was that of P.C. Sani and the learned Judge who saw and heard him has given adequate reasons, with justification in our view, for disbelieving him, to the extent of branding him as 'a pathetic case of misguided loyalty'. The learned Judge has also given his reasons for having grave doubts as to the contents of the visitors' book (D112A) said to have been kept at the operations room in Gemas but even if that book were accepted the question would arise as to whether P.C. Sani was with him at the operations room at the material time in the light of the fact that this visit to the operations room was not entered in his diary and his consistent insistence throughout his testimony that if the 1st appellant's programme was written in his diary he would be with him and if not he would be in the house and that he could not remember anything except what he had written in his diary.

There is then the question as to whether an entirely different light has been thrown on the evidence of Atun as a result of the compurgation by ASP Mohd. Ibrahim bin Abdul Rahman (DW23) who said that on April 28, 1982 he interviewed Atun who never told him the 1st appellant was at Gan Kee Estate or was one of the five persons he saw there and that he wrongly identified the 1st appellant as Abdullah Ambik in the photographs in an UMNO magazine shown to him. The assessment of ASP Ibrahim's evidence is once again a matter of credibility and the learned Judge who saw and heard him has given his reasons for finding no justification to reject Atun's evidence as a result. Mr. Jagjit Singh in his address made an allegation of a witch-hunt against this witness but we find no ground or basis whatsoever for this absolutely unwarranted remark in the face of the evidence. As we have said earlier in any event even if Atun's evidence is disregarded the case against the 1st appellant would not be affected.

Once again in dealing with the defence Mr. Jagjit Singh has severely criticised the findings of Gee and relies on the evidence of George E. Fassnacht (DW43) who was called by the 2nd appellant to testify as a firearms identification expert. Counsel contends that the learned Judge was wrong in holding that Fassnacht is not an expert in this field and not competent to give evidence as such. What the learned Judge in fact said was that he found it difficult to say with certainty that Fassnacht was peritus without any further proof of his qualification or experience as his academic qualification which is a B.A. degree in government has nothing to do with science and his experience was all in a foreign country. We have in dealing with Gee discussed the question of the competency of an expert being a preliminary question for the trial judge, with reference to authorities on the point. This was a matter for the Judge who saw and heard Fassnacht and we see no reason to interfere with the doubt he has expressed as to Fassnacht's standing as an expert for the reasons he has given.

In any event the learned Judge nevertheless did go on to consider the evidence Fassnacht gave and said he found it neither acceptable nor wholesome enough to cast any doubt on the veracity of Gee's evidence, and we would add that reading his evidence in cold print he appears to have confined himself less to giving evidence and more

to acting as an advocate of methodology by launching into a severe criticism of the methods used by Gee and the police in the firing and collection of test bullets and using a shooting box instead of a water tank. In consonance with the principle enunciated by the Privy Council in *Caldeira* v. *Gray*[47] and in view of conflicting literature on the subject referred to by both sides, we see no reason to interfere with the learned Judge's findings with regard to Fassnacht's evidence. It is open to a court to prefer the evidence of one expert to that of another and it would not be improper to act on the opinion of one expert although that is contradicted by another expert (*Joyce* v. *Yeomans (ante)*; *R.* v. *Sodo*[64]).

The learned Judge has carefully considered the evidence of the 1st appellant as to his possession, custody and control of P88 at the material time and the explanation he sought to give in respect of his statement to the police (P119), but did not consider this evidence as having cast any reasonable doubt for the reasons he has given. The 1st appellant testified that he was careful about his clutch bag and would not let it out of his sight and then added this depended on circumstances, but we are at a loss to understand what this qualification of his earlier categorical assertion sought to suggest. In his evidence in chief he said that when the pistol was carried in his clutch bag it would be kept in his wardrobe or on his writing table, that when he went to sleep in his house in Petaling Jaya he would keep it in the wardrobe but if he slept in places other than his own house he would put it under his pillow in his bedroom, and that when he put it under the pillow if outstation or in a hotel it would be kept in his clutch bag. He testified that on his return to his house in Tampin at 12.45 a.m. on April 14, 1982, he placed the clutch bag on the table in his room. The suggestion was made that somebody could have taken and used the pistol and replaced it but the learned Judge found this to be highly improbable for the reasons stated in his judgment in dealing with this proposition. The learned Judge found as a fact that the 1st appellant was always evasive in answering any question put to him with respect to the pistol.

Another matter that stands out from the 1st appellant's evidence is that he could remember clearly only the events of the evening of April 13, 1982 until the early hours of the next day and could remember the officers present in his house in Tampin at 12.45 a.m. on April 14, but not at other times, and there were many other occasions and matters put to him in cross-examination as to which his memory did not serve him just as well. It will be borne in mind in this connection that the learned Judge made a specific finding as to the teratical and concerted co-ordination of the relevant times in the evidence of the alibi witnesses.

Although motive is not a necessary ingredient to be established in the offence of murder, it would if shown tend to support the case against an accused so charged. The learned Judge discussed this aspect and found as the background to the events which transpired that the evidence adduced disclosed the existence of political antagonism and discord between the deceased and the 1st appellant and that this was reinforced by the evidence for the defence. The learned Judge observed as a finding of fact that looking at the evidence in its proper perspective it seemed clear to him that the deceased was an obstacle to the expansion of the power and influence of the 1st appellant in the political field.

In all these circumstances the learned Judge found that the evidence adduced by and for the 1st appellant in his defence as a whole has not succeeded in creating any doubt on the truth of the case for the prosecution and we concur with his finding.

In the event we dismiss the appeal by the 1st appellant and affirm his conviction and sentence of death.

One last thing. The Public Prosecutor has made a vehement, and in our view wholly justified, protest against the intemperate language and manner in which it is said Mr. Jagjit Singh both in his petition of appeal and address to us has mounted a virtually personal attack on the integrity of the learned Judge with an overt allegation of intimidation, bias and prejudice and even a fleeting suggestion of conspiracy with the prosecution coupled with a complaint that he had applied double standards in dealing with the witnesses for the prosecution and the defence.

Mr. Jagjit Singh complains in his petition of appeal that the learned Judge improperly and in a manner prejudicial to the defence made a judicial comment to the Public Prosecutor after having impeached the credit of Abdullah Ambik that 'he had slipped out of *our* hands', using the possessive pronoun in the plural and underscoring it, and in his address to us says that this means 'both hands

are joined or tied together', thus tending to suggest some sort of collusion on his part with the prosecution. In yet another ground of appeal he says that the learned Judge had improperly and in a manner prejudicial to the defence and without justification intimidated a defence witness Tan Chin Boon (DW11) when he said 'I am 52 years old. Don't try to cheat me. Who do you think you are trying to bluff?' or words to that effect.

The remark in connection with Abdullah Ambik could perhaps have been passed casually to relieve the tedium of an extended trial and could not in any way have affected his judgment and we can see no ground for imputing impropriety and prejudice in this context. With regard to Tan Chin Boon the learned Judge was obviously taken aback when this witness in giving evidence as to his purchase of some fried chicken suddenly and without being asked produced the receipt for the purchase from his pocket which even Mr. Jagjit Singh who was examining him was not aware of. The Public Prosecutor has explained the situation in which the learned Judge made this remark which clearly reflected his annoyance at the way the receipt was produced but he then accepted the witness's explanation and admitted the receipt in evidence. This again could not have coloured his judgment in any way and cannot in our view give rise to any suggestion that he was biased.

It is of course the duty of counsel to act fearlessly and with all the force and vigour at their disposal in the interest of the cause they represent but wholly within the bounds of propriety and courtesy in the discharge of their duties as officers of the court but they must equally remember that in the discharge of their duties they must judiciously use the right and privilege of appearing as such in court and not abuse it (per Abdoolcader, J., in *Re Kumaraendran; an Advocate & Solicitor*[65]). If it can be clearly shown that a justiciar was prejudiced or biased or otherwise conducted himself in an improper manner inconsonant with accepted standards in the administration of justice, then it will certainly be open for the point to be taken. We can however see no justification whatsoever in respect of the matters raised before us by counsel for the vituperative nature of the language in which the petition of appeal has been couched and the contumelious suggestions that have been put forward in his address to us which has dragged the learned Judge into the arena of the conflict and subjected him to a personal attack with a virtual suggestion of complicity on his part. We consider this line taken ill-chosen, mischievous and contemptuous in the circumstances. The appellants have not been denied a fair trial and the remarks that were subject to attack, though perhaps injudicious, were bereft of any sinister connotation against the background of the circumstances in which they were made, and could not and did not affect the proceedings or cause in any way any miscarriage of justice. We trust that this admonition will suffice to caution against any recurrence of a broadside of this nature grounded on blatantly inane innuendoes without any justification or basis merely in order to advance a cause.

Appeal of 1st appellant dismissed.
Appeal of 2nd appellant allowed.

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YAAKOB BIN MOHAMAD & ANOR. v. SINTAT RENT A CAR SERVICE (M) SDN. BHD. & ANOR.

[O.C.J. (George J.) November 25, 1982]
[Kuantan – Civil Suit No. 133 of 1976]

Road Traffic – Fatal motor accident in rural area – Motorists to be conscious of possibility of rural folk using road in manner one would not expect people in urban areas to do.

Damages – Quantum – Fatal accident – Healthy 60 year old farmer – Damages at $4,200 at 30% liability.

Bailment – Hired car in road accident – Owner of car retaining no control nor right to exercise control over car – Owner not liable.

The facts showed that one Robert Chen was driving his car along the said road. Ahead of him was the junction. It was then when another motor car driven by the 2nd defendant overtook Robert Chen and then moved into the lane for traffic to Pekan. There was then a collision between the motor car driven by the 2nd defendant and the cyclist who was fatally injured. The court found that the cyclist had turned from the left of the road into the path of the 2nd defendant's motor car without giving the 2nd defendant any reasonable opportunity of avoiding the collision. The deceased cyclist was a 60 year old farmer.

That part of the Kuantan/Pekan road where the accident happened was a straight road.

The 2nd defendant was driving a car hired from the 1st defendants.

Held: (1) motorists approaching cross-roads particularly in a rural area should be conscious of the possibility of the rural folk using the road in a manner one would not expect people in urban areas to do;